Selected Guideline Application Decisions for the Fourth Circuit

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U.S. SENTENCING COMMISSION GUIDELINES MANUAL
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CHAPTER ONE: *Introduction and General Application Principles*

Part B General Application Principles

§1B1.1 Application Instructions

United States v. Fenner, 147 F.3d 360 (4th Cir.), *cert. denied*, 525 U.S. 1030 (1998). The cross-reference in USSG §2K2.1 required the application of the homicide guideline where death resulted from the firearms offense for which the defendants were sentenced; the defendants had previously been acquitted of the homicide in state court. The defendants argued that the increase was so large that it could not be imposed on the basis of conduct they had been acquitted of without a violation of their rights to due process. The court of appeals rejected this argument, reasoning that the USSG §2K2.1(c)(1)(B) cross-reference does not create any presumption that the firearm offense of which the defendants were convicted involved death. Further, the court of appeals reasoned that the increase to which the defendants were exposed on account of the cross-reference, from 42 to 55 years' imprisonment and from 115 to 210 months' imprisonment, respectively, did not implicate due process concerns nor did the cross-reference become the tail which wags the dog of the substantive offense. The cross-reference does not create a new offense or increase the statutory maximum to which the defendants were exposed, but merely limits the discretion of the district court in selecting an appropriate sentence within the statutorily defined range.

§1B1.2 Applicable Guidelines

United States v. Locklear, 24 F.3d 641 (4th Cir.), *cert. denied*, 513 U.S. 978 (1994). The district court erroneously applied USSG §2D1.2 as a specific offense characteristic to increase the defendant's base offense level. The defendant was charged with conspiracy to possess with intent to distribute cocaine and marihuana, in violation of 21 U.S.C. §§ 841(a)(1), 846. The indictment also included a reference to the defendant's use of persons under the age of 18 in furtherance of the conspiracy, in violation of 21 U.S.C. § 861. However, the jury was never asked to find whether this activity occurred. Nonetheless, the district court enhanced the defendant's base offense level because the indictment gave him notice that his conduct violated section 861. In effect, the district court treated USSG §2D1.2 as a specific offense characteristic. The circuit court disapproved of this approach and concluded that it was inconsistent with the plain language of the guidelines. *But see United States v. Oppedahl*, 998 F.2d 584, 587 (n.4) (8th Cir. 1993) ("Section 2D1.2 does not require a conviction under 21 U.S.C. § 860 in order to consider such drug activities as relevant conduct in calculating the defendant's base offense level.") Section 1B1.2 instructs the sentencing judge to determine first the proper guideline and then any applicable specific offense characteristics under that guideline. Section 2D1.1, the guideline applicable in the instant case, has its own specific offense characteristics which do not include a cross-reference to USSG §2D1.2.

§1B1.3 Relevant Conduct

United States v. Butner, 277 F.3d 481 (4th Cir.), *cert. denied*, 536 U.S. 932 (2002). The district court erred when it did not include the full amount of the post-conversion deposits in the loss amount involved in the conspiracy to commit bankruptcy fraud. The appellate court held that the district court should have included the deposits as relevant conduct for sentencing purposes based on uncontroverted evidence. Those deposits served to link the deposits to the conspiracy. The appellate court ruled that if the district court had looked at the uncontroverted evidence, it would have been established that the post-conversion deposits were conduct relative to the conspiracy for sentencing purposes under USSG §1B1.3.

United States v. Chong, 285 F.3d 343 (4th Cir. 2002). The district court erred in applying a two-level enhancement for reckless endangerment based on USSG §1B1.3(a)(1)(B). The court applied a two-level enhancement because a codefendant, in an attempt to flee the police, drove down a one-way street and crashed the vehicle. The appellate court held that the relevant conduct standards are only to be applied in the absence of any specific provisions to the contrary in the underlying guideline. The court noted that a specific provision exists in Application Note 5 of USSG §3C1.2 which states "under this section, the defendant is accountable for his own conduct and for conduct he aided or abetted, counseled, commanded, induced, procured, or willfully caused." Because the record was incomplete as to whether the defendant's own conduct met the standard set in Note 5, the application of USSG §1B1.3 was inappropriate here.

United States v. Dove, 247 F.3d 152 (4th Cir.), *cert. denied*, 534 U.S. 945 (2001). The district court erred by including conduct that did not violate state law in its "relevant conduct" calculation under USSG §1B1.3. The appellate court held that relevant conduct under the guidelines must be criminal, rather than merely malignant or immoral.[1] The defendant was convicted of violation and conspiracy to violate the Lacey Act, a statute which imposes federal penalties for violations of state law that involve interstate commerce. The defendant sold black bear gall bladders to an undercover agent. The sale was illegal under Virginia state law where the defendant was prosecuted. However, the court concluded that although the offer and acceptance were made over the phone, the sale occurred in West Virginia–where the defendant operated his shop, where the undercover agent picked up his merchandise, and where the sale of the gall bladders was legal. Because the sale did not violate West Virginia state law, the necessary nexus for prosecution under the Lacey Act–a violation of state law–was not present, and the conduct was legal. The case was therefore remanded for a recalculation of the sentence excluding the sale of gall bladders as relevant conduct.

United States v. Hodge, 354 F.3d 306 (4th Cir. 2004). The appellate court affirmed the district court's determination that previous drug transactions were relevant conduct. The defendant appealed his conviction and sentence for possession of a firearm and ammunition by a

[1]The court also held that the district court's determination of the market value of the gall bladders, which was based on the average retail price and not the lower "smuggler's price," was not clearly erroneous for purposes of enhancing the sentence under USSG §2F1.1. *Id*. at 159.

convicted felon, and possession of cocaine with the intent to distribute. At sentencing, the district court found that, pursuant to §1B1.3, the 1996 drug transactions and the 1999 offense were part of the same course of conduct in that they were part of the same ongoing series of offenses. On appeal, the defendant argued that the 1996 drug transactions were not related to the 1999 drug trafficking offense and therefore could not be considered relevant conduct under §1B1.3. The Fourth Circuit noted that the district court found that the 1996 transactions and the 1999 offense were not isolated occurrences, but rather, part of a continuous pattern of narcotics trafficking. Based on the record, it was clear that the defendant had never stopped dealing drugs between 1996 and 1999. The court noted that, in its view, the government's strong showing of regularity compensated for the significant temporal gap between the 1996 uncharged conduct and the 1999 offense of conviction, as well as for a the absence of a strong showing of similarity. Accordingly, the district court did not err in counting the 1996 sales as relevant conduct.

United States v. Kimberlin, 18 F.3d 1156 (4th Cir.), *cert. denied*, 513 U.S. 843 (1994). Absent evidence of exceptional circumstances, . . . it [is] fairly inferable that a codefendant's possession of a dangerous weapon is foreseeable to a defendant with reason to believe that their collaborative criminal venture includes an exchange of controlled substances for a large amount of cash. *Id.* at1160, *citing United States v. Bianco*, 922 F.2d 910, 912 (1st Cir. 1991).

United States v. Moore, 29 F.3d 175 (4th Cir. 1994). The abuse of trust enhancement must be based on an individualized determination of each defendant's culpability and cannot be based solely on the acts of co-conspirators.

United States v. Patterson, 38 F.3d 139 (4th Cir. 1994), *cert. denied*, 514 U.S. 1113 (1995). Defendant Patterson pled guilty to distributing morphine and Demerol which resulted in the death of a female minor. Defendant Laythe pled guilty to aiding and abetting that offense. The defendants argued that the death was not reasonably foreseeable to them, and that in sentencing, the appellate court should "draw an analogy to recent drug conspiracy cases in which defendants, whose convictions are based upon the total quantity of drugs in the conspiracy, are sentenced according to the quantity of drugs reasonably foreseeable to each defendant." The appellate court declined to draw such an analogy, and noted that under the sentencing guidelines, the district court must consider relevant conduct in determining the appropriate offense level. As part of relevant conduct under USSG §1B1.1(a)(1)(A), the court must consider "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." The acts of distributing and aiding and abetting the distribution of the drugs are "wholly encompassed within the express language of subsection (A), which does not require a finding of reasonable foreseeability." *Id*. at 146. The convictions and sentences were affirmed.

United States v. Pauley, 289 F.3d 254 (4th Cir. 2002), *cert. denied*, 537 U.S. 1178 (2003). The district court did not err when it applied the cross-reference under USSG §2D1.1(d)(1) because the murders constituted relevant conduct under USSG §1B1.3(a)(2). The defendant pled guilty to aiding and abetting possession with intent to distribute methamphetamine and marijuana. The district court determined his sentence based on the quantity of marijuana involved and then applied the murder cross-reference. The murder cross-

reference called for a life sentence so the district court sentenced him to 40 years–the maximum sentence allowed under the statute for a conviction under 18 U.S.C. § 841(b)(1)(B). The string of thefts for which the defendant was indicted and the double murders that were committed during the course of one of the thefts were all part of the same course of conduct as required under USSG §1B1.3(a)(2). The appellate court held that inasmuch as the district court's determination that the murders were part of the same course of conduct or common scheme or plan was not clearly erroneous, including the murders as relevant conduct was appropriate.

The district court did not err when it held that all of the drugs found should be attributable to the defendant as relevant conduct. The defendant argued that some of the drugs were for his personal use and that only the drugs from the earlier thefts should be counted. However, the later thefts were determined to be a part of the same course of conduct and were therefore properly considered as relevant conduct. Furthermore, the appellate court held that the district court's determination that the whole quantity of drugs were for distribution was not clearly erroneous because the district court based its finding on the overall amount stolen and the fact that the proven purpose of all the thefts was for distribution and not personal use.

United States v. Rhynes, 206 F.3d 349 (4th Cir. 1999), *cert. denied*, 530 U.S. 1222 (2000). A district court has a separate obligation to make independent factual findings regarding relevant conduct for sentencing purposes. *See United States v. Love*, 134 F.3d 595, 605 (4th Cir. 1998), *cert. denied*, 524 U.S. 932 (1998); USSG §1B1.3. Forfeitures may not act as artificial limitations on the district court's sentencing discretion.

United States v. Walker, 29 F.3d 908 (4th Cir. 1994). The district court did not err in its disposition of two sentencing issues related to Federal Rule of Criminal Procedure 32(c)(3)(D), and USSG §1B1.3. First, the defendant argued that the district court erred in its application of Federal Rule of Criminal Procedure 32(c)(3)(D) by failing to address his objection to the presentence report recommendation that he be denied an adjustment for acceptance of responsibility. Second, the defendant argued that the district court erred by finding that the amount of loss caused by the defendant's fraudulent conduct exceeded $200,000 and by increasing his offense level under USSG §2F1.1(b)(1)(l). The Fourth Circuit held that both of the defendant's claims lacked merit. On the first issue, the Fourth Circuit held that given the defendant's "specific objections" to the factual findings underlying the presentence report recommendation that he be denied an adjustment for acceptance of responsibility, it is apparent that the district court satisfied its judicial obligation by making an adequate finding as to the defendant's allegations. *See United States v. Morgan*, 942 F.2d 243, 245 (4th Cir. 1991), *cert. denied*, 506 U.S. 1061 (1993). On the second issue, the Fourth Circuit held that "[the defendant's] undervaluing of his personal property itself–wholly independent from the government's calculation of the amount of loss–conclusively establishes that the amount of loss exceeded $200,000." 29 F.3d 908 at 913-914. *See* USSG §1B1.3(a)(3).

§1B1.8 Use of Certain Information

United States v. Lopez, 219 F.3d 343 (4th Cir. 2000). When the plea agreement expressly provides that any self-incriminating information would not be used in determining the applicable sentencing guideline range, the sentencing court cannot used the proffered statement as a basis for making a finding as to drug amount.

United States v. Washington, 146 F.3d 219 (4th Cir.), *cert. denied*, 525 U.S. 909 (1998). The district court erred in relying on the defendant's statements, which were protected under the defendant's plea agreement, to his probation officer regarding the amount of cocaine distributed to deny him a reduction for minimal or minor participant.

§1B1.10 Retroactivity of Amended Guideline Ranges

United States v. Capers, 61 F.3d 1100 (4th Cir. 1995), *cert. denied*, 517 U.S. 1211 (1996). The defendant was not entitled to retroactive application of USSG §3B1.1, enacted several months after his sentence was imposed, which would have prevented the application of the enhancement, because the amendment created a substantive change in the circuit's operation of USSG §3B1.1. The circuit court recognized, however, that the courts may give retroactive application to a clarifying (as opposed to substantive) amendment regardless of whether it is listed in USSG §1B1.10.

§1B1.11 Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

United States v. Lewis, 235 F.3d 215 (4th Cir. 2000), *cert. denied*, 534 U.S. 814 (2001). The district court did not violate the *Ex Post Facto* Clause when it applied the 1998 *Guidelines Manual* in calculating the defendant's sentence for conviction of four counts of filing false tax returns. The first offense occurred on April 13, 1993, when Lewis filed a false tax return for the year 1992. The other three offenses occurred on December 10, 1993, when Lewis filed false amended tax returns for the years 1990, 1991, and 1992. In the interim, on November 1, 1993, the sentencing guidelines were amended so as to increase the base offense level for filing a false tax return. The district court noted that USSG §1B1.11(b)(3) instructs that "if the defendant is convicted of two offenses, the first manual is to be applied to both offenses." Thus, as the defendant's offenses were committed before and after a revised edition, the district court applied the revised *Guidelines Manual* (the 1998 *Guidelines Manual*) in determining the defendant's sentence. The defendant appealed, arguing that because the application of the 1998 *Guidelines Manual* resulted in increased punishment for the first incident of tax evasion, the April 13, 1993 violation, the sentence violates the *Ex Post Facto* Clause. The appellate court noted that the *Ex Post Facto* Clause prohibits, *inter alia*, the enactment of "any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *See Weaver v. Graham*, 450 U.S. 24, 28 (1981). Further, the Clause seeks to ensure "that legislative Acts give fair warnings of their effect and permit individuals to rely on their meaning until explicitly changed." *Id.* at 29. The appellate court concluded that §1B1.11(b)(3) does not violate the *Ex Post Facto* Clause. The defendant had ample warning, when she committed the later acts of tax evasion, that those acts would

cause her sentence for the earlier crime to be determined in accordance with the *Guidelines Manual* applicable to the later offenses. Therefore, the district court was correct in applying the revised edition of the *Guidelines Manual*.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

§2A1.1 First Degree Murder[2]

United States v. Carr, 303 F.3d 539 (4th Cir. 2002), *cert. denied*, 537 U.S. 1138 (2003). The defendant was convicted for intentionally setting fire to an apartment building and causing the death of an occupant. At sentencing, the district court properly cross-referenced the arson guideline to USSG §2A1.1 (First Degree Murder). The defendant then sought a downward departure pursuant to §2A1.1, Application Note 1, which states that a downward departure may be warranted when the defendant did not knowingly or intentionally cause death. At sentencing the district court found that the defendant was recklessly indifferent as to whether people would be in the apartment building, equating reckless indifference with knowledge. Thus, the court denied the defendant's request for a downward departure. The court of appeals vacated the sentence and remanded for a clear finding as to whether the defendant knowingly caused the death of another.

§2A3.1 Abduction

United States v. Coates, 113 Fed Appx 520; 2004 U.S. App. LEXIS 22957 (4th Cir. 2004). The appellate court upheld the district court's four-level enhancement under USSG §2A3.1(b)(5) for abduction. The defendant sexually assaulted an 11-year-old girl in a Target department store. After approaching her when she was separated from her mother, he took her first to the lawn and garden department where he threatened her with an open pocket knife, and then moved her by the wrists to the men's department when customers approached. He assaulted her in both the lawn and garden and men's departments. The appellate court, applying Application Note 1(a) to USSG §1B1.1 defining "abducted" as meaning "the victim is forced to accompany the offender to a different location," found no error in the district court's finding that the movement from department to department constituted abduction. The appellate court also found that the district court did not err when it determined that the defendant's Kentucky sentence of a two-year conditional discharge is the equivalent of a sentence of probation.

[2]An amendment effective November 1, 2004, revised Commentary in §2A1.1 (First Degree Murder) to clarify that a downward departure from a mandatory statutory sentence of life imprisonment is permissible only in cases in which the government files a motion for a downward departure for the defendant's substantial assistance, pursuant to 18 U.S.C. § 3553(e); and deleted outdated language.

§2A6.1 Threatening or Harassing Communications

United States v. Brock, 211 F.3d 88 (4th Cir. 2000). The district court erred in applying a two-level enhancement based on finding that the defendant had made more than two threats. *See* USSG §2A6.1(b)(2). The defendant pled guilty to one count of violating 47 U.S.C. § 223(a)(1)(E) by making repeated interstate telephone calls for the purpose of harassing his former girlfriend. By the terms of the plea agreement, the defendant admitted only to using "threatening words," but denied that he "actually intended to threaten" his former girlfriend. The parties agreed that the applicable guideline was USSG §2A6.1(a)(2), which set the base offense level at six. The plea agreement additionally provided that the defendant, pursuant to USSG §2A6.1(b)(3), was subject to a two-level sentencing enhancement for violating a court protection order, but recommended a two-level reduction for acceptance of responsibility. *See* USSG §3E1.1(a). The presentence report, however, suggested that the defendant also was eligible for a two-level enhancement pursuant to USSG §2A6.1(b)(2) for making "more than two threats." At sentencing, the defendant objected to the two-level enhancement for making more than two threats. The district court overruled the objection. As a result, the defendant's adjusted offense level at sentencing was eight. On appeal, the appellate court first noted the modifying language of USSG §2A6.1(a)(2) such that, for the guideline to apply, the offense "did not involve a threat to injure a person or property." Otherwise, USSG §2A6.1(a)(1) would apply, with a corresponding base offense level of 12. As a result, "relevant conduct should be considered in determining" which subdivision applies. Consequently, if USSG §2A6.1(a)(2) applies, then the offense, even considering relevant conduct, did not involve threats to injure a person, as would be required for an enhancement under USSG §2A6.1(b)(2) to apply. Therefore, "because application of both provisions would require the district court to make contradictory factual findings," the enhancement for making more than two threats was improper.

United States v. Spring 108 Fed. Appx. 116 (4th Cir. 2004). The defendant had a long history of sending threatening communications to his probation officer and the judge who revoked his original supervised release sentence. In 1997, he pled guilty to one count of “mailing threatening communications” to a Sheriff’s office in North Carolina, for which he received a suspended sentence of ten years and three years supervised release. One month later, he was arrested on charges of violating his supervised release with possession of various weapons; the release was revoked and he was sentenced to nine months’ imprisonment. From prison, he sent a letter to the probation officer, making threats against him, his family, the judge and her family. He was convicted on three counts of making threats against federal officers. For the instant offense, while in jail, he mailed several more threatening letters to the probation officer and the judge, including one mailed to the judge’s chambers containing a white powder the letter claimed was anthrax. He was convicted by jury trial of two counts of threatening to use a weapon of mass destruction against a court house and 15 counts of mailing threatening communications. Since the USSG treats the threat to commit a violent crime as a violent crime, the controlling factor in the sentence was the defendant’s status as a career offender with the instant offense as the necessary third conviction. The appellate court found that the sentencing court improperly gave a downward departure based on overstating criminal history after sentencing on the basis of criminal history.

United States v. Stokes, 347 F.3d 103 (4th Cir. 2003). The phrase "more than two threats," as used in §2A6.1(b)(2), referred to the number of threatening communications, not the number of victims threatened.

United States v. Worrell, 313 F.3d 867 (4th Cir. 2002), *cert. denied*, 538 U.S. 1021 (2003). Pre-threat relevant conduct may be used as evidence of intent to carry out the threat if there is a substantial and direct connection with the offense.

Part B Offenses Involving Property

§2B1.1 Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States[3]

United States v. Ruhe, 191 F.3d 376 (4th Cir. 1999). There is no statutory reason why the value of certain goods for jurisdiction purposes should be the same as the value for sentencing purposes. The definition of loss for jurisdiction purposes requires a determination of the value of the goods. Loss for guidelines purposes means that value which most closely represents the loss to the victim, and not the monetary value of the property involved. *See* USSG §2B1.1, comment. (n.2).

§2B3.1 Robbery

United States v. Reevey, 364 F.3d 151 (4th Cir. 2004). The district court erred in imposing a threat-of-death enhancement because it resulted in an impermissible double counting. The defendant was charged in a three-count indictment with carjacking, kidnapping, and possessing a firearm in furtherance of a crime of violence. At sentencing, the district court imposed several sentence enhancements, one being a two-level enhancement for "a threat of death" pursuant to §2B3.1(b)(2)(F). On appeal, the defendant argued that the two-level sentencing enhancement for a threat of death, combined with his section 924(c) conviction and sentence, resulted in an impermissible double counting under the guidelines. In support of his argument, the defendant relied on the commentary to §2K2.4, Application Note 4. The Fourth Circuit noted that double counting occurs when a provision of the guidelines is applied to increase punishment on the basis of a consideration that has been accounted for by application of another guideline provision or by application of a statute. The court stated that pursuant to Application Note 4 of §2K2.4, a sentencing court may not apply an enhancement for possession or use of a firearm if the defendant has also been convicted and sentenced under section 924(c)

[3]An amendment effective November 1, 2004, referenced the new offense, 18 U.S.C. § 1037 (Fraud and Related Activity in Connection with Electronic Mail) to §2B1.1 (Theft, Fraud, or Property Destruction) in Appendix A; added an enhancement if a defendant is convicted under 18 U.S.C. § 1037 and the offense involved obtaining electronic mail addressed through "improper means;" defined "improper means"; and provided instruction in the Commentary to apply the "mass marketing" enhancement in any case in which the defendant either is convicted under 18 U.S.C. § 1037 or committed an offense that involves conduct described in 18 U.S.C. § 1037.

for possession of that firearm in furtherance of a crime of violence. The court stated that the relevant inquiry, under Application Note 4, was whether the threat-of-death enhancement was applied "for possession, brandishing, use, or discharge of an explosive or firearm." In the instant case, both of the threats made by the defendant were to shoot Jones with a handgun that the defendant had already displayed, and they involved the firearm the defendant was convicted of possessing under section 924(c). *See United States v. Franks*, 230 F.3d 811, 813-14 (5th Cir. 2000) (concluding that sentencing court erred in enhancing sentence under §2B3.1(b)(2)(F), where it was clear from evidence that threat of death was related to use of firearm); *United States v. Triplett*, 104 F.3d 1074, 1081-82 (8th Cir. 1997) (same). The court concluded that the application of the enhancement fell within the scope of Application Note 4's double-counting prohibition.

United States v. Souther, 221 F.3d 626 (4th Cir. 2000), *cert. denied*, 531 U.S. 1099 (2001). Where the defendant kept his hands in his coat pockets during the robberies after having handed the teller a note indicating that he had a gun, and it appeared that the defendant did have a dangerous weapon, the enhancement was proper even though the defendant did not in fact have a weapon and did not simulate the presence of a weapon with his hands beyond placing them in his pockets. *See* USSG §2B3.1(b)(2)(E), comment. (n.2).

United States v. Wilson, 198 F.3d 467 (4th Cir. 1999), *cert. denied*, 529 U.S. 1076 (2000). The appellate court upheld the district court's application of USSG §2B3.1(b)(4)(B) physical restraint enhancement during a carjacking. The defendants were convicted of carjacking (18 U.S.C. § 2119) and a section 924(c) count. The district court applied a two-level enhancement to the defendant's offense level for physical restraint of a person to facilitate commission of carjacking pursuant to USSG §2B3.1(b)(4)(B), and the defendant appealed. The appellate court noted that USSG §2B3.1(b)(4) provides for a two-level enhancement "if any person was physically restrained to facilitate commission of the offense." Furthermore, a physical restraint enhancement is proper under USSG §2B3.1 if the act of physical restraint adds to the basic crime. *See United States v. Mikalajunas*, 936 F.2d 153 (4th Cir. 1991), *cert. denied*, 529 U.S. 1010 (2002). The appellate court concluded that the district court properly applied the physical restraint enhancement. A gun was placed to the defendant's head, and she was prevented from leaving her car, albeit briefly, until the defendants could get her money and control of the car. Thus, the victim was physically restrained to facilitate the commission of the carjacking. In reaching its decision, the appellate court noted that physical restraint is not an element of carjacking.

Part C Offenses Involving Public Officials

§2C1.1 Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right[4]

United States v. Kinter, 235 F.3d 192 (4th Cir. 2000), *cert. denied*, 532 U.S. 937 (2001). When a middleman defendant acts on behalf of a third-party payer of a bribe, the district court may consider the payer's bribe-generated benefits when calculating the "benefit received" under USSG §2C1.1. The defendant was convicted of conspiracy, bribery of a public official, and payment of a gratuity to a public official. The defendant and a co-conspirator decided to "sell" the influence of the defendant's former son-in-law, an IRS employee, to Washington Data, a contractor, in exchange for kickbacks from Washington Data. The kickback due the defendant and co-conspirator was three percent of the revenue that the defendant and co-conspirator secured for Washington Data. At sentencing, the court determined that the defendant paid more than one bribe and that Washington Data's profit was $9.5 million. The defendant appealed, arguing that the court should have only considered the amount that the defendant personally received, which was $350,000, and not the benefit received by Washington Data. The appellate court affirmed the district court's decision to calculate the amount of the payer's benefit. The appellate court noted that the defendant and Washington Data undertook the bribery conspiracy jointly. The appellate court also noted that USSG §2C1.1 commentary states that "for deterrence purposes, the punishment for bribery should be commensurate with the gain to the payer or the recipient of the bribe, whichever is higher." The appellate court stated that in cases involving a middleman in a bribery scheme, such as this one, a court should first determine which party was, in actuality, the payer of the bribe and then calculate the gain to the payer. Thus, as long as the profits were reasonably foreseeable or the result of acts aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant, the amount of profit can be used in calculating the "benefit received" under USSG §2C1.1.

United States v. Matzkin, 14 F.3d 1014 (4th Cir. 1994). The district court properly enhanced the defendant's sentence for influencing an official in a sensitive position pursuant to USSG §2C1.1(b)(2)(B). The defendant was convicted of bribery of a Navy employee who, as supervisory engineer, used his position to acquire and transfer information to the defendant relating to defense contract procurements. The defendant argued that since his Navy contact was only a GS-15 Navy engineer, he was merely a mid-level employee who lacked the power to award contracts on his own. The court of appeals disagreed, citing to the contact's position on the procurement review panel as evidence of his sensitive position. His position on this three person board provided him with the opportunity not only to obtain the information, but also to influence the Navy's final decision making, since it was unlikely that the Navy would grant a bid without the favorable opinion of the review board.

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[4]An amendment effective November 1, 2004, consolidated §§2C1.1 and 2C1.7 as the new bribery and extortion guideline at §2C1.1 and consolidated §§2C1.2 and 2C1.6 as the new gratuity guideline at §2C1.2; added two separate offense characteristics for "loss" and "status" and added other enhancements if the offense involved an "elected public official"or a "public official" in a high-level decision-making or sensitive position or the offender is a public official whose position involves the security of the borders of the United States; and added to commentary a clarification of the meaning of "high-level decision-making or sensitive position."

United States v. Quinn, 359 F.3d 666 (4th Cir. 2004). The lower court erred because they added the gross rather than the net values of the contracts to calculate the loss for a bribery payment. The defendants also asserted that the district court erred in failing to grant a downward departure because of the sentence disparity between the two appellants and a codefendant who pled guilty rather than go to trial. Disparity is not enough to grant a departure, and the district court found no evidence of prosecutorial misconduct. The sentence was vacated and remanded for recalculation of loss.

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy[5]

United States v. Christmas, 222 F.3d 141 (4th Cir. 2000), *cert. denied*, 531 U.S. 1098 (2001). Two-level enhancement for possession of a dangerous weapon, pursuant to USSG §2D1.1(b)(1), was proper and did not constitute double jeopardy even though the defendant previously had been convicted in state court for the same possession of the same firearm. Under the doctrine of dual sovereignty, federal prosecutions are not barred by a previous state prosecution for the same or similar conduct. *See Abbate v. United States*, 359 U.S. 187 (1959).

United States v. Fletcher, 74 F.3d 49 (4th Cir.), *cert. denied*, 519 U.S. 857 (1996). The amendments to USSG §2D1.1 and its inclusion in USSG §1B1.10(c) for retroactive application required resentencing. The amended guideline provides that each marijuana plant is equivalent to 100 grams of dry marijuana, regardless of the number or sex of the plants involved. Under the amended provision, the defendant was responsible for the equivalent of 72.2 kilograms of dry marijuana (level 22, guideline range 41 to 51 months), rather than 722 kilograms (level 30, guideline range 97 to 121 months).

United States v. Fullilove, 388 F.3d 104 (4th Cir. 2004). In a case in which law enforcement officers removed 26 grams of cocaine base from a suspicious package prior to its delivery, inserting a transmitter and leaving .37 grams for delivery, the appellate court held that the district court should have sentenced based on the pre-delivery weight rather than the delivery weight of .37 grams. The appellate court determined the district court's calculation resulted from an error in interpreting the guideline language which states that the "defendant is accountable for all quantities of contraband with which he was directly involved." USSG §1B.1.3(a)(1)(A) (2003). Relying on decisions in the Ninth, Sixth, Seventh, and Eighth Circuits,

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[5]An amendment effective November 1, 2004, added a new enhancement to §2D1.1 for distribution of a controlled substance, and the like, through the use of an interactive computer service; provided a definition of "interactive computer service"; increased penalties for GHB and GBL in the Drug Equivalency Tables by setting threshold amounts for triggering the five-year term for GHB at three gallons; and for triggering a ten-year sentence for GHB at 30 gallons, added to Commentary a reference to controlled substance analogues and the extent to which potency can be taken into account in determining the appropriate sentence; clarified that Note 12 applies to a defendant-buyer in a reverse sting operation; provided a special instruction requiring application of the vulnerable victim adjustment under §3A1.1(b)(1) if the defendant distributes a controlled substance to another individual during the commission of a sexual offense; and repealed the current "mitigating role cap" at §2D1.1(a)(3) to replace it with an alternative approach which would provide net reductions that correspond with designated base offense levels.

the appellate court determined that the seriousness of the offense was not alleviated by the intervention by law enforcement officials, and thus the defendant's culpability was not related to the quantity delivered but to the quantity planned for delivery. The case was remanded for resentencing.

United States v. Harris, 39 F.3d 1262 (4th Cir. 1994). The district court sentenced defendant Boone to a mandatory minimum sentence of life imprisonment under 21 U.S.C. § 841(b)(1)(A), based on its aggregation of quantities of different controlled substances involved in the conspiracy, to arrive at 52 grams of cocaine base. Subsequent to his sentencing, the appellate court decided *United States v. Irvin*, 2 F.3d 72, 73, 77 (4th Cir. 1993), *cert. denied*, 510 U.S. 1125 (1994), which noted that although aggregation of drug quantities may be required sometimes under the sentencing guidelines, "section 841(b) provides no mechanism for aggregating quantities of different controlled substances to yield a total amount of narcotics." The sentence was vacated and remanded for resentencing in light of *Irvin*.

United States v. Houchins, 364 F.3d 182 (4th Cir. 2004). The appellate court affirmed the district court's enhancement under §2D1.1(b)(5)(B). At sentencing, the district court found that the defendants had subjected their community to a substantial risk of harm through the unsafe manufacture of methamphetamine, and it concluded that their offense levels should be enhanced by three levels pursuant to §2D1.1(b)(5)(B). The risk enhancement found in §2D1.1(b)(5)(B) is only applicable when the offense of conviction satisfies two criteria, that is, it "(i) involved the manufacture of ... methamphetamine; and (ii) created a substantial risk of harm to (I) human life ...; or (II) the environment..." The defendants argued that, because they were not operating an "active" methamphetamine laboratory, no precursor chemicals were found at their production sites, and no quantifiable amounts of toxic or hazardous substances were disposed of into the environment surrounding those cites, the district court's application of the risk enhancement to their offense level was improper. The Fourth Circuit noted that Application Note 20 of §2D1.1 identified four factors a sentencing court must assess in determining whether an offense created a substantial risk of harm to human life or the environment: 1) the storage factor; 2) the release factor; 3) the extent factor; and 4) the location factor. Based on the instant case, the court concluded that the district court had properly assessed all four factors, and did not err in determining that the risk enhancement was warranted under each.

United States v. Hyppolite, 65 F.3d 1151 (4th Cir. 1995), *cert. denied*, 517 U.S. 1162 (1996). The district court did not commit clear error in converting all the cocaine powder found in his apartment into cocaine base for sentencing purposes, where credible evidence was presented to establish that the powder cocaine was manufactured into cocaine base for distribution.

United States v. Kimberlin, 18 F.3d 1156 (4th Cir.), *cert. denied*, 513 U.S. 843 (1994). The two-level enhancement applied to the defendant's base levels as a result of co-conspirator's possession of a firearm was proper since it was foreseeable that the firearm would be used in the drug offense.

United States v. Lipford, 203 F.3d 259 (4th Cir. 2000). The appellate court vacated the defendant's sentence after it reinstated the defendant's 18 U.S.C. § 924(c) conviction. The

district court had increased the defendant's sentence by two levels after finding that the defendant possessed a firearm during the drug conspiracy. However, the district court ordered a judgment of acquittal on the defendant's section 924(c) conviction, and the government appealed. The appellate court reinstated the defendant's section 924(c)(1) conviction, which was based on carrying a firearm during and in relation to a drug transaction. The appellate court noted that under certain conditions, the guidelines prohibit an increase in base offense level for possession of a firearm if the same conduct served as the basis for a conviction under section 924(c)(1). The appellate court concluded that the record is sufficiently ambiguous that the district court could have relied upon the same conduct underlying the section 924(c) conviction when it increased the defendant's sentence two levels pursuant to USSG §2D1.1(b)(1). The court vacated the sentence and remanded for the district court to determine whether the increase under USSG §2D1.1(b)(1) is warranted in light of the section 924(c)(1) conviction.

United States v. Lowry 2004 U.S. App. LEXIS 24308 (4th Cir. 2004). The appellate court upheld the district court's use of the defendant's own admissions to an investigator as the basis for determining the drug quantity involved. The appellate court, noting that the admission was against interest, determined it established a sufficient indicia of reliability to support the court's findings.

United States v. McAllister, 272 F.3d 228 (4th Cir. 2001). The district court erred in applying the two-level enhancement under USSG §2D1.1(b)(1) for possession of a firearm during a drug felony, a violation of 21 U.S.C. § 841. The Fourth Circuit found that there was no reliable evidence to support the application of the enhancement. The only evidence upon which the district court based the enhancement was contained in a Drug Enforcement Administration (DEA) investigation report. The report was based on the interview of a single person who claimed that he saw the defendant with handguns "on many occasions." The report was admitted into evidence and read into the record, but the report did not assert that the informant saw the defendant with a handgun during a narcotics transaction. Thus, the district court could only speculate as to when the gun was used.

United States v. Strickland, 245 F.3d 368 (4th Cir.), *cert. denied*, 534 U.S. 930 (2001). The district court's error in enhancing sentences beyond the statutory maximum when quantities of drugs were not found by a jury beyond a reasonable doubt was not plain error that affected the defendants' substantial rights. The defendants were convicted of conspiracy to engage in drug trafficking–specifically dealing in crack cocaine. Ten defendants challenged their sentence, claiming that because drug quantities were not charged in the indictment and not found by a jury beyond a reasonable doubt, their due process and trial rights had been violated. The appellate court only reviewed the sentences that exceeded the statutory maximum, pursuant to *Apprendi*. In so doing, the court used a plain-error standard of review under which the defendants had to prove that the admitted error affected their substantial rights. The court held that because "the uncontroverted evidence demonstrated amounts hundreds of times more than the amounts charged," and because in the court's estimation a jury would have come to this conclusion beyond a reasonable doubt, the error did not affect the defendants's substantial rights. *Id*. at 380.

United States v. Turner, 59 F.3d 481 (4th Cir. 1995). The defendant was convicted for conspiracy to possess with intent to distribute in excess of one gram of LSD, distribution of LSD within 1,000 feet of a school, and aiding and abetting in the possession with the intent to

distribute marijuana within 1,000 feet of a school. On appeal, the defendant argued that Amendment 488 to the *U.S. Sentencing Guidelines Manual* applied retroactively to reduce his sentence. The court held that Amendment 488, which amended *U.S. Sentencing Guidelines Manual* §2D1.1(c) by establishing a uniform weight to be used in determining the offense level in cases involving LSD on a carrier medium, applied retroactively to the determination of the defendant's base level offense for sentencing purposes. The court held that *U.S. Sentencing Guidelines Manual* §2D1.1(c) Application Note 18 was controlling on the issue of sentences involving liquid LSD because it was the only explicit reference in the *U.S. Sentencing Guidelines Manual*. The court held that Application Note 18 applied in this case because the U.S. Sentencing Commission intended "liquid LSD" to refer to pure LSD dissolved or suspended in a liquid solvent, the form at issue in this case.

United States v. Wallace, 22 F.3d 84 (4th Cir.), *cert. denied*, 513 U.S. 910 (1994). The term "cocaine base" as used in USSG §2D1.1 was not unconstitutionally vague and the 100 to 1 sentencing ratio of cocaine base to powder cocaine under 21 U.S.C. § 841(b) did not violate the Equal Protection Clause. *See United States v. Thomas*, 900 F.2d 37 (4th Cir. 1990); *United States v. Bynum*, 3 F.3d 769 (4th Cir. 1993), *cert. denied*, 510 U.S. 1132 (1994); *United States v. Pinto*, 905 F.2d 47 (4th Cir. 1990). In addition, the 100 to 1 ratio did not constitute racial genocide in violation of 18 U.S.C. § 1901, as Congress did not establish it with the "specific intent" of "destroying" any racial or ethnic group.

§2D1.2 Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy

See United States v. Locklear, 24 F.3d 641 (4th Cir.), *cert. denied*, 513 U.S. 978 (1994), §1B1.2, p. 1.

Part F [Deleted]

§2F1.1 Fraud[6]

United States v. Lugo, 2005 U.S. App. LEXIS 985 (4th Cir. 2005). In a case involving various crimes in connection with a fraudulent telemarketing scheme and bankruptcy fraud, appellants Katz and Lugo challenged district court's determination that a forensic accountant was not necessary for determining loss, the district court's use of the mail and wire fraud guideline rather than the money laundering guideline, and the district court's failure to determine the degree of responsibility of one of the co-defendants. The appellate court noted that the determination whether to use a forensic accountant was within the court's discretion. In this case, the appellate court noted that the Sentencing Guidelines permit the sentencing court to make "a reasonable estimate of the loss" based on the evidence presented. USSC §2F1.1, note 8 (1998). The appellate court noted that the loss figure underlying the sentencing calculation was based on evidence presented at trial, finding no error on the part of the district court. At *17. The appellate court noted convictions for offenses punishable by money laundering and mail and

[6]Effective November 1, 2001, §§2F1.1, 2B1.2, and 2B1.3 were deleted by consolidation with §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). *See* USSG App. C, amendment 617.

wire fraud are closely related crimes that must be grouped. See USSG §3D1.2(d). The appellate court found that Katz's contention that he should be sentenced under the money laundering guideline reflected a misunderstanding of the guideline provision that requires in the case of grouped offenses for the defendant to be sentenced under the guideline that produces the highest offense guideline. Although the money laundering guideline has a higher base offense level, the mail and wire fraud guideline results in a higher total offense level for this case, and thus should be used. Regarding the finding of the degree of responsibility of Lugo as coconspirator, the appellate court determined that the district court erred in failing to establish the amount of loss attributable to her, and as such was reversible error. The appellate court upheld the convictions and Katz's sentence, and remanded for redetermination of Lugo's sentence.

Part G Offenses Involving Prostitution, Sexual Exploitation of Minors, and Obscenity

§2G2.2 Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic[7]

United States v. Dotson, 324 F.3d 256 (4th Cir. 2003). The defendant pled guilty to attempting to receive in commerce a child pornography videotape. The defendant answered an advertisement and placed an order for a child pornography videotape. The district court did not err in applying a two-level increase under USSG §2G2.2(b)(5) for the use of a computer in connection with the offense. The Fourth Circuit concluded that under the guidelines, those who seek out and respond to notice and advertisement of such materials are as culpable as those who initially send out the notice and advertisement. The court affirmed the district court's enhancement pursuant to §2G2.2(b)(5).

United States v. Williams, 253 F.3d 789 (4th Cir. 2001). The district court did not err in applying a five-level increase for distribution of child pornography for pecuniary gain. The defendant appealed his sentence for mailing child pornography in interstate commerce, claiming that his conduct was not "distribution" within the meaning of USSG §2G2.2(b)(2) because he did not do it for pecuniary gain. The court of appeals held that including pecuniary gain in the definition of "distribution" in Application Note 1 does not necessarily exclude distribution that is gratuitous. In support of its interpretation, the court cited to the general application principles which state that the use of the word "includes" is not exhaustive. *See* §1B1.1 comment. (n.2).

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[7] An amendment effective November 1, 2004, consolidated §§2G2.2 and 2G2.4 to avoid confusion in the application of these guidelines; provided alternative base offense levels, if the defendant was convicted of 18 U.S.C. § 2252(a)(4), § 2252A(a)(5) (possession offenses) or § 1466 (solicitation offense), and a separate offense level for all other offenses; added a number of enhancements related to trafficking and receipt of child pornography; broadened the computer enhancement to include "interactive compute" as defined in 47 U.S.C. § 230 (f)(2) and to apply to offenses in which the computer (or an interactive computer service) was used for possession of pornographic material; added Commentary to §2G2.2 which counts each video, video-clip, movie, or similar recording as having 75 images; made several other minor changes to §2G2.2, Commentary, such as providing the definitions of "computer" and "image"; clarified existing definitions of "minor" and "distribution"; and clarified that a defendant does not need to intend to possess, receive, or distribute sadistic or masochistic images for application of this enhancement.

Noting a circuit split and adopting the majority position, the court reasoned that such an interpretation is justified by: 1) the policy of punishing those who dispense child pornography more severely than those who receive it, and 2) the fact that there would still be a significant number of gratuitous distribution cases to which the enhancement would not apply. (*E.g.*, advertisers and receivers of child pornography in trafficking chains). The court explained that the intent of the guideline drafters in making the retail value of pornography a basis for graduated punishment was to establish a measure which could act as a proxy for the harm. This intent would be contravened if gratuitous traffickers who *caused the same amount of harm* as the for-profit traffickers were treated more leniently.[8]

Part J Offenses Involving the Administration of Justice

§2J1.2 Obstruction of Justice[9]

United States v. Blount, 364 F.3d 173 (4th Cir. 2004). The appellate court affirmed the district court's eight-level enhancement under USSG §2J1.2. The defendant was convicted of obstructing the due administration of justice by threats and force during the courtroom sentencing of his mother. The district court applied §2J1.2(b)(1), an eight-level enhancement because the offense involved causing physical injury in order to obstruct justice. The district court borrowed a causation analysis from tort law, imputing to defendant any injury foreseeable and resulting from an unbroken chain of circumstances. The Fourth Circuit agreed with the defendant that §2J1.2(b)(1) includes an element of intent. The guideline requirements are not satisfied by showing simply that a defendant caused physical injury, a showing that would not necessarily need to include intent. Rather, the under the guidelines, a defendant must cause physical injury for the purpose of obstructing justice. This purpose of obstructing justice not only requires an intent to cause physical injury, but it also narrows that intent such that the injury must be caused to obstruct justice, not for some other purpose. The government must also prove that the defendant had a specific intent to cause the consequences that actually resulted. The court noted that §2J1.2(b)(1) required proof of only general intent of the type defined by the common law. The government must show that the defendant's obstruction of justice resulting in physical injury be accompanied by (1) the defendant's knowledge that physical injury will result from the obstructive conduct, or (2) the defendant's desire to cause physical injury to obstruct justice, or (3) the defendant's belief that, in obstructing justice, physical injury is substantially certain to result from his conduct. The court concluded that the district court properly applied §2J1.2(b)(1) to the instant case.

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[8]It is unclear why the court did not classify this as distribution under USSG §2G2.2(b)(2)(B) – "[d]istribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain." Application Note 1 contemplates the exact "bartering" scenario that occurred in this case *and* the increase would be the same as under subsection (b)(2)(A).

[9]Effective January 25, 2003, the Commission, in response to a congressional directive contained in sections 805 and 1104 of the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, increased the base offense level and added a two-level enhancement to ensure deterrence and punishment of obstruction of justice offenses generally, especially in cases involving destruction or fabrication of documents or other physical evidence. *See* USSG, App. C, Amendment 647.

Part K Offenses Involving Public Safety

§2K1.4 Arson; Property Damage by Use of Explosives

See United States v. Davis, 202 F.3d 212 (4th Cir.), *cert. denied*, 530 U.S. 1236 (2000). Shooting a gun constituted a "use of explosives" under §2K1.4.

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition[10]

United States v. Blount, 337 F.3d 404 (4th Cir. 2003). The district court was correct in refusing to apply an enhancement under USSG §2K2.1(b)(5) because although the defendant committed another felony offense the record contained no evidence that the defendant possessed the firearm "in connection with" that offense. The question on appeal was whether a §2K2.1(b)(5) enhancement should apply when a defendant acquired a firearm during a theft or burglary but did not use the firearm or show any willingness to do so. The Fourth Circuit determined that in order to answer this question, it had to consider whether the burglary committed by the defendant constituted "another felony offense" and, if so, whether the firearm and ammunition underlying the defendant's conviction were possessed "in connection with" the burglary. The court held that the burglary did qualify as "another felony offense" but that a §2K2.1(b)(5) enhancement was nonetheless improper because the record did not demonstrate a sufficient nexus between the burglary and the defendant's possession of a firearm. The court noted that its past opinions treated "in connection with" as synonymous with "in relation to." *See United States v. Garnett*, 243 F.3d 824 (4th Cir. 2001). In other words, a weapon is used or possessed "in connection with" another offense if the weapon facilitated or has a tendency to facilitate the [other] offense. *Id.* at 829. The firearm must have some purpose or effect with respect to the crime; its presence or involvement could not be the result of accident or coincidence. *See United States v. Lipford*, 203 F.3d 259, 266 (4th Cir. 2000). Accordingly, the district court was affirmed in its decision not to apply a §2K2.1(b)(5) enhancement.

United States v. Dunford, 148 F.3d 385 (4th Cir. 1998). The defendant's convictions on 14 firearms counts, based on 6 guns and ammunition, were unconstitutionally duplicative. The defendant was convicted of seven counts under 18 U.S.C. § 922(g)(1) (prohibited possession of a firearm or ammunition by a convicted felon) and seven under section 922(g)(3) (prohibited possession of a firearm or ammunition by an illegal drug user). The court of appeals held that while a person must be a member of at least one of the nine classes prohibited from possessing guns under section 922(g), a person who is disqualified from possessing a firearm because of

[10] An amendment effective November 1, 2004, increased the enhancement for the offense involving a destructive device if the destructive device was a man-portable air defense system (MANPADS), portable rocket, missile, or device used for launching a portable rocket of missile; but maintained a two-level enhancement for all other destructive devices; provided an upward departure for non-MANPADS destructive devices where the two-level enhancement for such devices did not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk to public welfare, and the risk of death or serious bodily injury that the destructive device created; adopted the statutory definition of "destructive devices" provided in 26 U.S.C. § 5845(f) as the guideline definition and similarly substitutes statutory definitions for the definitions of "ammunition" and "firearm," and increased guideline penalties for attempts and conspiracies to commit certain offenses if those offenses involved the use of a MANPADS or similar destructive devices.

membership in multiple classes does not thereby commit separate and multiple offenses. The offense is determined by performance of the prohibited conduct, not by reason of the defendant's legal status alone. The court of appeals further held that Dunford's possession of six firearms and ammunition did not constitute seven acts of possession under 18 U.S.C. § 922(g), but rather one. Interpreting 18 U.S.C. § 1202(a), the predecessor to section 922(g), the court had held that when a convicted felon acquires two or more firearms in one transaction and stores and possesses them together, he commits only one offense under the statute. *See United States v. Mullins*, 698 F.2d 686 (4th Cir.), *cert. denied*, 460 U.S. 1073 (1983). Applying that rule, the court held that Dunford's possession of the six firearms and ammunition, seized at the same time from his house, supports only one conviction under 18 U.S.C. § 922(g).

See United States v. Fenner, 147 F.3d 360 (4th Cir.), *cert. denied*, 525 U.S. 1030 (1998), §1B1.1, p. 1.

United States v. Garnett, 243 F.3d 824 (4th Cir. 2001). The defendant stole a $1,300 machine gun and gave it to another person to sell and use the proceeds to obtain drugs. The defendant received $20 worth of cocaine base. At sentencing, the district court increased the defendant's offense level for using the firearm in connection with a second felony offense. The appellate court held that, while it was clear that defendant used the firearm to facilitate a drug-related offense, the evidence was insufficient to find that the offense rose to the level of a felony offense. There was no finding of the specific amount of cocaine base involved, and such a finding was necessary in order to determine whether the second offense was a felony or a misdemeanor. Such a finding was necessary to support the enhancement since the evidence did not support the alternate felony offense of conspiracy to distribute drugs, and the firearms trafficking offense was expressly excluded as a basis for the enhancement. Further, while conspiracy to possess drugs or transferring the firearm for drugs could constitute the requisite felony offense of drug trafficking, the record lacked the necessary evidence to find that either offense was a felony offense. The appellate court held, as a matter of law, purchase or possession of any felony amount of drugs would constitute a drug trafficking crime for purposes of 18 U.S.C. §924(c) – use of a firearm in connection with a drug trafficking offense.

United States v. Greene, 108 Fed. Appx. 814 (4th Cir. 2004). The appellate court upheld the district court's application of a two-level enhancement for possession of a firearm. The defendant claimed district court clearly erred in adding the enhancement since it was "clearly improbable" that sporting and hunting firearms, locked in a display cabinet, were connected with his drug sales. He noted that three of the four sales took place at his place of business, not at home where the guns were kept. The appellate court disagreed, and agreed instead with the district court which found that the large number of firearms present at the defendant's home could intimidate any one who came there to buy drugs, and that the guns could have been used to protect the drugs in the defendant's home. The appellate court also noted that the government need not establish a perfect connection between the firearms and the offense, and that possession of the weapon during the commission of the offense is all that is necessary. Affirmed.

United States v. Levenite, 277 F.3d 454 (4th Cir.), *cert. denied*, 535 U.S. 1105 (2002). The district court did not err by including detonators as weapons for a six-level enhancement under USSG §2K2.1(b)(1)(C). The appellate court held that since a firearm, under USSG

§2K2.1, includes a destructive device as defined by 26 U.S.C. § 5845, which includes "any combination of parts either designed or intended for use in converting any device into a destructive device . . . and from which a destructive device may be readily assembled," a detonator could potentially be a destructive device subject to proof from the government that the defendant intended to use it as a weapon. The government produced evidence that the defendant had no legitimate reason or commercial purpose for possession of the detonators. The government also produced testimony that the detonators were manufactured and designed to set off explosives like dynamite. Finally, the government produced evidence that the detonators were seized from the defendant's house along with various other firearms. The appellate court held that although the evidence presented by the government was circumstantial it was sufficient to support a finding that the defendant intended to use the detonators as weapons.

United States v. Mazyck 111 Fed Appx. 683 (4th Cir. 2004). The appellate court upheld the district court's use of a dismissed charge of possession of a stolen weapon to apply a two-level enhancement. The appellate court noted that sentencing court may consider underlying dismissed charges as relevant conduct in determining appropriate sentences. *United States v. Jones 31 F.3d 1304, 1316 (4th* Cir. 1994); *see also USSG 1B1.3 (2002).*

United States v. Payton, 28 F.3d 17 (4th Cir.), *cert. denied*, 513 U.S. 976 (1994). The district court did not err in enhancing the defendant's sentence based on his two prior felony convictions of a "crime of violence" pursuant to USSG §2K2.1(a)(2). The defendant was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He argued that his prior state conviction for involuntary manslaughter was not a "crime of violence" because it was not a specific intent crime and because the catchall phrase of USSG §4B1.2 applies only to crimes against property. The circuit court relied on USSG §4B1.2, Application Note 2 which specifically includes manslaughter within the definition of a "crime of violence." Although the circuit court acknowledged that the application note does not distinguish between voluntary and involuntary manslaughter, it followed *United States v. Springfield*, 829 F.2d 860 (9th Cir. 1987), in which the Ninth Circuit held that involuntary manslaughter, by its nature, "involves the death of another person [and] is highly likely to be the result of violence. It thus comes within the intent, if not the precise wording of section 924(c)(3)[(B)]." *Id*. at 863.

United States v. Schaal, 340 F.3d 196 (4th Cir. 2003). The defendant and her husband were arrested when law enforcement officers witnessed them breaking into a home. On appeal, the defendant argued that the district court impermissibly double counted by applying both the USSG §2K2.1(b)(4) enhancement–because the firearms were stolen–and the USSG §2K2.1(b)(5) enhancement–because the defendant used or possessed a firearm in connection with another felony offense. The defendant argued that the §2K2.1(b)(5) enhancement already took into account the fact that the weapons were stolen and therefore the §2K2.1(b)(4) enhancement constituted double counting. The Fourth Circuit noted that nothing in the guidelines prohibited the application of a §2K2.1(b)(4) and §2K2.1(b)(5) enhancement under the instant circumstances. The court noted that the Commission had addressed the issue of double counting with regard to §2K2.1(b)(4) without forbidding simultaneous application of the §2K2.1(b)(4) and (b)(5) enhancements. In addition, the court also noted that the two enhancements were conceptually separate, as evidenced by the fact that either could apply in the absence of the

other. Consequently, the court concluded that the district court did not engage in impermissible double counting in applying the two enhancements together.

United States v. Solomon, 274 F.3d 825 (4th Cir. 2001). The Fourth Circuit vacated the sentence and remanded the case for resentencing when a defendant received an eight-level reduction for possessing a firearm solely for lawful sporting purposes or collection under USSG §2K2.1(b)(2). The defendant purchased a 9mm pistol and falsely answered "no" to the question regarding whether he had ever been convicted of a misdemeanor crime on a federal form, violating 18 U.S.C. § 922(g)(9). The Fourth Circuit noted that the district court applied the lawful sporting purposes or collection reduction despite the fact that there was no evidence of the purpose for which the weapon had been used. Section 2K2.1(b)(2) permits a reduction only if a firearm is possessed "solely for lawful sporting purposes or collection–and no other purpose." Because neither the district court nor the probation officer made any findings as to the exact use of the firearm, it could not be said to fit this definition. Therefore, because the record lacked a factual basis for the reduction, the case was remanded to the district court for resentencing.

§2K2.4 Use of Firearms or Armor-Piercing Ammunition During or in Relation to Certain Crimes

United States v. Hamrick, 43 F.3d 877 (4th Cir.), *cert. denied*, 516 U.S. 825 (1995). The district court did not err in concluding that the improvised dysfunctional incendiary letter bomb used by the defendant in his attempt to assassinate a United States Attorney was a "destructive device" under 18 U.S.C. § 924(c)(1). The defendant argued that the terms "firearm" and "destructive device" in section 924(c)(1) were interchangeable and thus the district court should have imposed the five-year sentence prescribed for use of a "firearm" instead of the 30-year sentence prescribed for use of a "destructive device." The circuit court, convening en banc, ruled that while "firearm" is defined to include "destructive device," the terms are not interchangeable. Rather, a "destructive device" is a subset of "firearm," and the statute is unambiguous that use of a destructive device shall be punished by 30 years' imprisonment. The circuit court, however, was divided, with two concurring opinions expressing doubt as to whether the dysfunctional bomb was a destructive device, and one dissenting opinion concluding that the bomb was not a "deadly or dangerous weapon" for the purpose of sentence enhancement.

United States v. Hopkins, 310 F.3d 145 (4th Cir. 2002), *cert. denied*, 537 U.S. 1238 (2003). The Supreme Court determined that Congress did not intend to make brandishing a separate element of an 18 U.S.C. § 924(c) offense, but intended it to be a sentencing factor to be addressed by the court. *Id.* at 154-55 (citing *Harris v. United States*, 536 U.S. 545 (2002)).

United States v. Williams, 152 F.3d 294 (4th Cir. 1998). The defective indictment charging the defendant with "possessing," rather than "using" or "carrying" a firearm in connection with a drug trafficking crime under 18 U.S.C. § 924(c) did not amount to plain error. The mere failure to track the precise language of the statute does not, without more, constitute error.

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.2 Unlawfully Entering or Remaining in the United States[11]

United States v. Campbell, 94 F.3d 125 (4th Cir. 1996), *cert. denied*, 520 U.S. 1242 (1997). The district court correctly determined that the defendant's manslaughter conviction was a crime of violence included in the definition of "aggravated felony" under 8 U.S.C. § 1101(a)(43)(f) and, therefore, properly applied a 16-level enhancement to the defendant's sentence. The defendant argued that the district court improperly applied the statute because his underlying "aggravated felony" conviction occurred in 1989 which preceded the amendment date that extended the definition of an "aggravated felony" to include crimes of violence. The appellate court disagreed, and relied chiefly on *United States v. Garcia-Rico*, 46 F.3d 8 (5th Cir.), *cert. denied*, 515 U.S. 1150 (1995), in holding that the obvious intent of the amendment was to allow the predicated offenses to be used as enhancement penalties for those aliens who had been deported after being convicted of an aggravated felony. Additionally, the court noted that in considering a sentence under USSG §2L1.2(b)(2), all prior felonies, no matter how ancient, were relevant in the determination of a sentence.

Part S Money Laundering and Monetary Transaction Reporting

§2S1.1 Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity[12]

United States v. Barton, 32 F.3d 61 (4th Cir. 1994). The defendant pled guilty to attempted money laundering. The district court properly rejected the defendant's argument that USSG §2S1.1(b)(2)'s definition of "value of the funds" should be determined by the amount of money actually used in the government sting. Rather, the "value of the funds" is the amount of money the defendant agreed to launder. To hold otherwise would allow the government to affect a sentencing variable simply by adjusting the amount of flash money used, and it would ignore the amount the defendant agreed and intended to launder. The defendant further argued that the three-level increase under USSG §2S1.1 for laundering drug proceeds did not apply to him because the 1989 version of the guideline sanctions only actual knowledge that the money was the result of a drug transaction, not mere belief that the funds were drug proceeds. Although the defendant believed the money was the result of a drug distribution, in reality it was government sting money. The circuits that have addressed this issue have reached different conclusions. The Eleventh Circuit held that mere belief is "sufficient to trigger an enhancement under the 1989 version of the guideline." *Id*. at 65. *See United States v. Perez*, 992 F.2d 295 (11th Cir. 1993). The Fifth Circuit, however, held that actual knowledge of the source of the funds is required. *United States v. Breque*, 964 F.2d 381 (5th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). This court, following the holding of the Fifth Circuit, cited a subsequent amendment to the guideline

[11]*See* USSG App. C, Amendment 658.

[12]Effective November 1, 2001, the Commission consolidated §§2S1.1 and 2S1.2 into a single new guideline, §2S1.1, which resulted in increased penalties for defendants who laundered funds derived from more serious underlying criminal conduct, and decreased penalties for defendants whose laundered funds derived from less serious underlying conduct. *See* USSG App. C, Amendment 634.

which added the words "or believed," and its stated purpose to reflect the enactment of a new law which addressed defendants caught in government stings, to support its interpretation that the earlier version of the guideline did not sanction "belief."

United States v. Godwin, 272 F.3d 659 (4th Cir. 2001), *cert. denied*, 535 U.S. 1069 (2002). The district court correctly applied USSG §2S1.1 in quantifying the loss attributable to the fraud scheme of defendants convicted of mail fraud under 18 U.S.C. § 1341, conspiracy to commit money laundering under 18 U.S.C. § 1956(h), six counts of money laundering under §1956(a)(1)(A)(i), and three counts of making false declarations in a bankruptcy case under 18 U.S.C. § 152(3). The Fourth Circuit ruled that the district court's determination of the loss attributable to their fraud scheme was correct despite the defendants' contention that certain amounts of money paid by three non-testifying investors and funds obtained in good faith should not have been included. The Fourth Circuit cited *United States v. Loayza*, 107 F.3d 257, 266 (4th Cir. 1997), to state that the "determination of loss attributable to a fraud scheme is a factual issue for resolution by the district court and we review such a finding of fact only for clear error." The court in this case found no error in the district court's determination under USSG §2S1.1 of the amount of money involved in this type of crime because it is an indicator of the magnitude of the commercial enterprise.

§2S1.3 Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts

United States v. Abdi, 342 F.3d 313 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1522 (2004). The district court did not err when it concluded that the defendants were not entitled to the sentencing reduction offered by the safe harbor provision of USSG §2S1.3(b)(2). The defendants pled guilty to conspiracy to structure financial transactions to evade reporting requirements in violation of 31 U.S.C. § 5324. The Fourth Circuit noted that in the instant case the defendants had failed to demonstrate that the proceeds that they structured were from lawful activities and that the monies they transmitted were to be used for a lawful purpose. Accordingly, the defendants were unable to meet their burden of satisfying the conditions for the safe harbor provision to obtain a reduction of their sentence offense level. The court also noted that the defendants' argument that their conduct could only be measured by reasonably foreseeable acts in furtherance of the jointly undertaken criminal activity, as provided under §1B1.3(a), failed to recognize that §1B1.3 defined the factors relevant to determine generally the scope for which a defendant was to be sentenced. The factors set forth in §1B1.3(a) were not intended to overrule specific factors made controlling by an applicable guideline. In other words, the specific language of §2S1.3(b)(2) controlled when determining whether the defendants were entitled to the reduction. Consequently, §2S1.3(b)(2)(D) was not limited to the defendants' conduct.

Part T Offenses Involving Taxation

§2T3.1 Evading Import Duties or Restrcitions (Smuggling); Receiving or Trafficking in Smuggled Property

United States v. Hassanzadeh, 271 F.3d 574 (4th Cir. 2001). The district court did not err in sentencing a defendant for aiding and abetting the making of a false statement and illegally importing carpets of Iranian origin, violating 18 U.S.C. §§ 542 and 545 respectively. Hassanzadeh challenged his sentence on three grounds: the method used to calculate the loss figure on which his offense level was based, the value assigned to the carpets, and the inclusion in the sentencing calculation of carpets made before the state of Iran came into existence. The Fourth Circuit held that the calculation used by the court applies to "items for which entry is prohibited, limited, or restricted," and "harmful" under USSG §2T3.1. The court cited the comment of that guideline, noting the Sentencing Commission's emphasis that the evaded duty "may not adequately reflect the harm to society or protected industries." *See id*. at 578. While the defendant correctly argued that the carpet industry is not a protected industry, the goods for which he was convicted were specifically banned by an Executive Order, which sought to "ensure that the United States imports of Iranian goods and services will not contribute financial support to terrorism or to further aggressive actions against non-belligerent shipping." *See* Exec. Order No. 12,613, 31 C.F.R. § 560.201 (1987). According to the Fourth Circuit, contribution of financial support to terrorism constitutes greater harm to society than harms usually associated with the illegal importation of goods. Thus, the goods in question clearly fit the definition of posing a significant "harm to society" and received the correct calculation.

The court also found that the district court did not err in its appraisal value of the carpets. The district court based its estimated value of the carpets on numbers given by experts during the trial. According to *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985), "findings based on the credibility of witnesses require great deference to the trial court's findings."

Finally, the Fourth Circuit found that the inclusion of the 42 carpets made before 1935 in the calculation of the loss amount for sentencing purposes was also correct. The defendant had argued that the carpets created before 1935 should not be included as "goods of Iranian origin" because Iran was not recognized as a state until 1935. The Fourth Circuit disagreed stating that "the language, history and purpose the Executive Order (and the regulations interpreting it)" indicate that rugs made prior to 1935 in the area currently known as Iran are "goods of Iranian origin." *See id*. at 582. Accordingly, the importation of these rugs was banned and they should have been included in calculating the loss amount.

Part X Other Offenses

§2X3.1 Accessory After the Fact

United States v. Godwin, 253 F.3d 784 (4th Cir. 2001). The defendant was convicted of harboring a fugitive in violation of 18 U.S.C. § 922(g). The district court erred when it used, as the base offense level for the defendant, the fugitive's actual offense level rather than using the level for the underlying offense. The applicable guideline for harboring a fugitive is the accessory-after-the-fact guideline, §2X3.1, under which subsection (a) sets the base level at "6 levels lower than the offense level for the underlying offense." The "underlying offense" is defined in Application Note 1 as "the offense as to which the defendant is convicted of being an accessory," *i.e.*, the fugitive's offense. USSG §2X3.1, comment (n.1). The fugitive in this case was convicted of possession of a firearm by a prohibited person, which carries a base offense level of 14 under §2K2.1(a)(6). Instead of using a base offense level of 14, the district court used the base level of 24 for the defendant, the level that the fugitive was *actually* sentenced to and which reflected enhancements for criminal history. The Fourth Circuit held that there is no support for this interpretation in the language of §2X3.1, because that guideline refers to the level of the "underlying offense" and not the level actually applied to the "principal offender." The court noted, however, that the base level could be higher than 14 if the principal had received enhancements for the firearms charge pursuant to USSG §2K2.1 which "involve the actual conduct of the [principal] in the context of the charged offense," as opposed to "enhancements based on the criminal history" of the principal. *Id.* at *4.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

United States v. Bolden, 325 F.3d 471 (4th Cir. 2003). The district court erred in applying the vulnerable victim two-level enhancement pursuant to USSG §3A1.1. Under the 1994 guidelines, a two-part test was used for assessing the applicability of the vulnerable victim adjustment. First, the victim must be "unusually vulnerable," and second, the victim must also have been targeted by the defendant because of the victim's unusual vulnerability. In the instant case, the court noted that, while it was indisputable that the residents of Emerald Health were elderly, and many of them likely suffered from both mental and physical ailments, there were no factual findings showing that the vulnerability of the Emerald Health's residents facilitated defendant-Glennis Bolden's offenses. Furthermore, there were no factual findings supporting the idea that these residents were targeted because of their unusual vulnerability.

United States v. Bonetti, 277 F.3d 441 (4th Cir. 2002). The adjustment under USSG §3A1.1 for a vulnerable victim applied only to the victim's vulnerability and not to the duration of the offense.

United States v. Hill, 322 F.3d 301 (4th Cir.), *cert. denied*, 124 S. Ct. 236 (2003). The Fourth Circuit noted that under §3A1.1 a defendant should receive a two-level enhancement if he

knew or should have known that a victim of the offense was a vulnerable victim. Furthermore, the court noted that a vulnerable victim is defined as one who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to criminal conduct. In the instant case, the victim was in his mid-sixties, had suffered a stroke, and lived like a hermit. The court held that there was more than enough evidence to support the district court's finding that the vulnerable victim enhancement applied. The district court's sentence was affirmed.

§3A1.2 Official Victim[13]

United States v. Harrison, 272 F.3d 220 (4th Cir. 2001), *cert. denied*, 537 U.S. 839 (2002). The district court correctly applied adjustments for assault on an officer and reckless endangerment during flight under §§3A1.2(b) and 3C1.2. Defendants Harrison and Burnett pled guilty to armed bank robbery, 18 U.S.C. § 2113(a), (d), and using or carrying a firearm in a crime of violence, 18 U.S.C. § 924(c). After robbing a bank, the defendants engaged police in a high-speed multiple car chase during which an accomplice fired shots at officers and both vehicles crashed. The defendants argued that the adjustments made were based on the same conduct. The Fourth Circuit found that the adjustments made under USSG §§3A1.2 and 3C1.2 were not erroneous because each was based on separate conduct.

The court also found that USSG §§3A1.2 and 3C1.2 were applied correctly to Harrison. Even though he was not carrying a gun, Harrison was accountable for the reasonably foreseeable conduct of the others involved in the furtherance of the jointly undertaken criminal activity under USSG §1B1.3. The court also held that the district court did not err in finding that Harrison could reasonably foresee that one of his armed codefendants could fire a weapon that would create a risk of serious bodily injury and that Harrison "aided and abetted conduct that created a substantial risk of death or serious bodily injury to the children in the getaway cars and the public during the high-speed flight that followed the robbery."

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Nicolaou, 180 F.3d 565 (4th Cir.1999). The district court did not err in applying a leadership enhancement after the defendant's related offenses were grouped. The defendants were convicted of conducting an illegal gambling business, money laundering, and income tax charges. Furthermore, the appellate court concluded that the defendant's gambling offenses were relevant conduct under the guidelines because they occurred during the commission of, and in preparation for "the money laundering." USSG §1B1.3(a)(1). Without the gambling operation, there would have been no ill-gotten gains to launder.

United States v. Rashwan, 328 F.3d 160 (4th Cir.), *cert. denied*, 124 S. Ct. 320 (2003). The Fourth Circuit noted that, under USSG §3B1.1, a sentencing court should consider whether the defendant exercised decision making authority for the venture, whether he recruited others to participate in the crime, whether he took part in planning or organizing the offense, and the

[13]An amendment effective November 1, 2004, restructured §3A1.2 (Official Victim) and provides a two-tiered adjustment with a three-level adjustment for offenses motivated by the status of the official victim and a six-level adjustment if the defendant's offense guideline was a Chapter Two, Part A (Offenses Against a Person).

degree of control and authority that he exercised over others. Furthermore, the court noted that leadership over only one other participant is sufficient as long as there was some control exercised.

United States v. Turner, 198 F.3d 425 (4th Cir. 1999), *cert. denied*, 529 U.S. 1061 (2000). Because the offense of intentionally killing and causing the intentional killing of an individual while engaging in a continuing criminal enterprise did not include a supervisory role as an element of the offense, a two-level adjustment pursuant to USSG §3B1.1(c) for the defendant's role in the offense was not impermissible double counting.

§3B1.2 Mitigating Role

United States v. Cabell, 2004 U.S. App. LEXIS 26689 (4th Cir. 2004). The appellate court upheld the district court's finding that the defendant who aided and abetted the bank robber did not have a minor role since she drove him to the bank and from the bank knowing his intention to rob the bank.

United States v. Pratt, 239 F.3d 640 (4th Cir. 2001). Whether the defendant is a minor participant in the conspiracy is measured not only by comparing his role to that of his codefendants, but also by determining whether his "'conduct is material or essential to committing the offense.'" *Id*. at 646.

See United States v. Washington, 146 F.3d 219 (4th Cir.), *cert. denied*, 525 U.S. 909 (1998), §1B1.8, p. 5.

§3B1.3 Abuse of Position of Trust or Use of Special Skill

United States v. Akinkoye, 185 F.3d 192 (4th Cir. 1999), *cert. denied*, 528 U.S. 1177 (2000). The Fourth Circuit has rejected a mechanistic approach to abuse of trust that excludes defendants from consideration based on their job titles. Instead, several factors should be examined in determining whether a defendant abused a position of trust. Those factors include: 1) whether the defendant had either special duties or special access to information not available to other employees; 2) the extent of discretion the defendant possesses; 3) whether the defendant's acts indicate that he is "more culpable than the others" who are in positions similar to his and engage in criminal acts; and 4) viewing the entire question of abuse of trust from the victim's perspective. The appellate court stated that in reviewing the factors in the defendant's case, the district court did not err in determining that the defendant held a position of trust. First, the defendant had special access to information as a real estate agent. The agency's clients not only gave the agency confidential information, but also keys to their homes. In addition, the defendant's position made his criminal activities harder to detect. Finally, although the banks may have ultimately borne the financial burden, the clients were victimized as well because their identities and credit histories were used to facilitate the crime.

United States v. Bolden, 325 F.3d 471 (4th Cir. 2003). The Fourth Circuit noted that, under USSG §3B1.3, an adjustment in the base offense level was authorized if the defendant abused a position of public or private trust in a manner that significantly facilitated the

commission or concealment of the offense. Furthermore, the court noted that the question of whether an individual occupied a position of trust should be addressed from the perspective of the victim. In the instant case, the victims were Medicaid and the American taxpayers. Medicaid entrusted the defendant with thousands of dollars in prospective payments to Emerald Health, that were to be used for the benefit of its Medicaid beneficiaries. Her abuse of that authority contributed significantly to the commission and concealment of the fraud scheme. Accordingly, the court affirmed the district court's application of the "abuse of position of trust" adjustment.

United States v. Caplinger, 339 F.3d 226 (4th Cir. 2003). The district court erred in applying a two-level enhancement under USSG §3B1.3 on the ground that the defendant abused a position of trust when he misrepresented himself as a prominent physician in an effort to attract investors. The Fourth Circuit noted that application of an enhancement under §3B1.3 required more than a mere showing that the victim had confidence in the defendant; something more akin to a fiduciary function was required. The fact that the defendant posed as a physician did not by itself mean that he occupied a position of trust. The defendant did not assume a physician-patient relationship with any of the victims. Rather, the victims were simply investors who invested their money in IPI. The court concluded that although the defendant's assumed status as an accomplished physician was used by Weekly and Kampetis to persuade the investors to place money into the defendant's venture, the facts did not support the conclusion that the defendant, by posing as a physician, occupied a position of trust with the victims as that term was used in §3B1.3 of the guidelines. Accordingly, the district court erred in applying a two level enhancement under §3B1.3.

United States v. Godwin, 272 F.3d 659 (4th Cir. 2001), *cert. denied*, 535 U.S. 1069 (2002). Adjustment for an abuse of trust was permitted because the sentencing court found ample evidence to support an abuse of position of trust. USSG §3B1.3 says that the enhancement applies where the defendant "perpetrates a financial fraud by leading an investor to believe the defendant is a legitimate investment broker." Evidence of such actions in this case included the defendant's solicitation of investors through her work as an accountant and as a tax preparer as well as testimony from witnesses who stated that they gave money to the defendant because they trusted her.

United States v. Gormley, 201 F.3d 290 (4th Cir. 2000). The district court erred in applying a USSG §3B1.3 special skill enhancement. The defendant operated a tax preparation business out of his convenience store. He was not an accountant and had no special training in the area of tax preparation. The district court applied a USSG §3B1.3 special skills enhancement, relying on the fact that the defendant used some special skills, and that he availed himself of services of co-conspirators who had special skills. The appellate court reversed, concluding that the defendant did not have special skills, and that his co-conspirators' skills were not relevant to the enhancement. The appellate court noted that "role in the offense" adjustments, such as the special skill enhancement, are based on a defendant's status, not based on a co-conspirator's action. *See United States v. Moore*, 29 F.3d 175 (4th Cir. 1994). Therefore, to the extent the district court relied on the special skills of the defendant's co-conspirators, it committed clear error. The district court also erred in its interpretation of the guidelines by concluding that tax preparation as practiced by the defendant was a special skill.

The appellate court noted that a special skill usually requires substantial education, training or licensing, and that the record reflected that the defendant did not have any formal training in the areas of tax preparation.

United States v. Mackey, 114 F.3d 470 (4th Cir. 1997). The appeals court affirmed the district court's application of a two-level enhancement for an abuse of trust. The defendant, a group leader in the Sales Audit Department at Woodward and Lothrop, used her computer authorization code to perpetrate fraudulent returns of merchandise credits totaling approximately $40,000. The district court enhanced the defendant's sentence two levels under USSG §3B1.3 of the sentencing guidelines for "Abuse of Position of Trust or Use of Special Skill." The defendant argued that the enhancement was unwarranted because her position did not fall within the definition of "public or private trust." The defendant relied on *United States v. Helton*, 953 F.2d 867 (4th Cir. 1992), to support her argument that her position was functionally equivalent to an ordinary bank teller. The district court rejected the defendant's argument and distinguished *Helton*. The defendant was one of two group leaders in the department and possessed a computer authorization code that others did not and used that code to conceal the fraudulent transactions. The fraud committed by the teller in *Helton* did not require any special access

See United States v. Moore, 29 F.3d 175 (4th Cir. 1994), §1B1.3, p. 3.

§3B1.4 Using a Minor to Commit a Crime

United States v. Murphy, 254 F.3d 511 (4th Cir.), *cert. denied*, 534 U.S. 1073 (2001). The plain language of the congressional directive to "promulgate guidelines or amend existing guidelines to provide that a defendant 21 years of age or older who has been convicted of an offense shall receive an appropriate sentence enhancement if the defendant involved a minor in the commission of the offense," did not expressly prohibit a younger defendant from receiving such an enhancement. *Id*. at 513. *See* USSG §3B1.4.

Part C Obstruction

§3C1.1 Obstruction or Impeding the Administration of Justice

United States v. Freeman, 2004 U.S. App. LEXIS 25435 (4th Cir. 2004). The appellate court upheld the district court's application of the two-level obstruction of justice enhancement. Although the PSR did not recommend the enhancement, the court found that the defense had sufficient notice of the possibility of the enhancement when it received notice of the government's objection to the PSR. The appellate court also found that although the district court did not address each element of the alleged perjury in a separate and clear finding, it did find that the district court's finding of obstruction "sufficiently encompassed all of the factual predicates for a perjury finding." *Citing United States v. Stotts*, 113 F3d 493,498 (4th Cir. 1997).

United States v. Godwin, 272 F.3d 659 (4th Cir. 2001), *cert. denied*, 535 U.S. 1069 (2002). The district court correctly enhanced the defendants' sentence for obstruction of justice under USSG §3C1.1. The Fourth Circuit stated that USSG §3C1.1 permits an increase in the defendant's offense level by two levels if the defendant commits perjury by giving "false

testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *See United States v. Dunnigan*, 507 U.S. 87, 96 (1993); *United States v. Keith*, 42 F.3d 234 (4th Cir. 1994). Because the defendants fulfilled this requirement, the court applied the enhancement accordingly.

United States v. Gormley, 201 F.3d 290 (4th Cir. 2000). The defendant was convicted of conspiracy to defraud the United States and filing fraudulent tax return claims in connection with a rapid refund enterprise. The defendant appealed only his sentence specifically with respect to an enhancement for obstruction of justice and an enhancement for use of a special skill. After the trial, but before sentencing, the probation officer charged with preparing the presentence report interviewed the defendant. According to the probation officer, the defendant denied knowingly listing false information on the tax returns, recording only the information provided to him by his clients, the validity of which he did not investigate. As a result, the defendant denied engaging in any criminal activities. Noting a "denial of guilt" exception to the obstruction of justice enhancement (*see* USSG §3C1.1, comment. (n.1)), the appellate court nevertheless affirmed its application inasmuch as the defendant's statements to the probation officer "went beyond merely denying his guilt and implicated his taxpayer clients in the scheme to defraud the IRS," and were material inasmuch as the statements could have affected the sentence ultimately imposed. *See* USSG §3C1.1, comment. (n.3(h)); *United States v. Dedeker*, 961 F.2d 164, 167 (11th Cir. 1992) (stating threshold for materiality is "conspicuously low").

United States v. Hudson, 272 F.3d 260 (4th Cir. 2001). The Fourth Circuit reversed the decision of the district court, finding that it erred in applying a USSG §3C1.1 enhancement after the defendant fled and failed to appear at his sentencing hearing. The defendant pled guilty to drug trafficking and was released on bond pending sentencing. He then failed to appear at his sentencing hearing because he feared the length of his upcoming sentence. The defendant failed to appear at scheduled meetings and avoided apprehension by police for more than six months. The district court refused to enhance Hudson's sentence because it accepted his explanation for his absence. The Fourth Circuit held that his flight served as a willful obstruction of justice and remanded the case for resentencing. According to the court, "§3C1.1 directs a sentencing court to increase a defendant's offense level by two levels if the defendant willfully obstructed or impeded the administration of justice during the course of the investigation, prosecution or sentencing of the instant offense of conviction, and the obstructive conduct related to the defendant's offense of conviction and any relevant conduct." USSG §3C1.1, comment. (n.4(e)).

See United States v. Quinn, 359 F.3d 666 (4th Cir. 2004), §2C1.1, p. 11.

United States v. Savage, 390 F3d 823 (4th Cir. 2004). The appellate court upheld the district court's two-level enhancement per USSG §2F1.1(b)(4)(C), finding that the defendant's transfer of assets in violation of a court order during a civil action by one of his victims was entirely proper.

United States v. Stewart, 256 F.3d 231, 253 (4th Cir.), *cert. denied*, 534 U.S. 1049 (2001). The district court did not err by finding that the defendant obstructed justice and by enhancing the defendant's sentence by two levels pursuant to USSG §3C1.1 where the defendant engaged in continuous misconduct throughout the trial, making gun-like hand gestures and shouting outside the jury room in an attempt to intimidate the jurors.

United States v. Sun, 278 F.3d 302 (4th Cir. 2002). The district court did not err when it enhanced the sentence of a defendant because he willfully made materially false statements when he testified in his defense at trial. The defendant was convicted of conspiracy to export defense articles on the United States Munitions List without a license and conspiracy to commit money laundering in violation of 19 U.S.C. § 371, 18 U.S.C. § 1956(a)(2), and 22 U.S.C. § 2778. The obstruction of justice enhancement must be applied if the defendant commits or suborns perjury according to USSG §3C1.1 (n.4(b)). Under *United States v. Smith*, 62 F.3d 641, 646 (4th Cir. 1995), in order to apply the obstruction of justice enhancement based on perjury, the sentencing court, by a preponderance of the evidence must find three components: (1) the defendant gave false testimony, (2) about a material matter (3) with the wilful intent to deceive. The enhancement in perjury situations is not automatic every time a defendant is convicted. In this instance, the district court found that the defendant made several materially false statements with the willful intent to deceive the court including his reliance on the advice of counsel, on the advice of a State Department official, and in his denial of his intent when he committed the illegal act. Because the defendant lied about these material issues and matters at the heart of the case, the court found sufficient willful intent to deceive and rejected the defendant's challenge to the two-level increase.

United States v. Vega, 2005 U.S. App. LEXIS 1381 (4th Cir. 2005). The appellate court upheld the district court's application of the obstruction of justice enhancement and denial of safety valve adjustment based on the defendant's perjured testimony during trial.

§3C1.2 Reckless Endangerment During Flight

United States v. Chong, 285 F.3d 343 (4th Cir. 2002). The district court erred in applying a two-level enhancement for reckless endangerment based on USSG §1B1.3(a)(1)(B). Provisions of USSG §1B1.3 are only to be applied absent any specifications to the contrary. Application Note 5 of §3C1.2 limits the defendant's responsibility for acts of another to circumstances in which he "aided or abetted, counseled, commanded, induced, procured, or willfully caused that conduct." The appellate court held that in order to apply the behavior of a codefendant there must be "some form of direct or active participation consistent with Application Note 5."

United States v. Harrison, 272 F.3d 220 (4th Cir. 2001), *cert. denied*, 537 U.S. 839 (2002). Adjustments made under USSG §§3A1.2 and 3C1.2 were not erroneous because each was based on separate conduct.

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts[14]

United States v. Bolden, 325 F.3d 471 (4th Cir. 2003). Fraud and money laundering offenses should only be grouped when they are closely related. The defendants' money

[14]An amendment effective November 1, 2004, added §2G3.1 to the list of guidelines at §3D1.2(d) since these offenses typically are continuous and ongoing in nature; and added §2X6.1 to list of offenses specifically excluded from being grouped under §3D1.2(d)).

laundering activities were essential to achieving the improper extraction of monies from Medicaid, and their money laundering and fraud activities were part of a continuous, common scheme to defraud Medicaid. The court concluded that the district court had properly grouped the fraud and money laundering offenses because they were closely related.

United States v. Pitts, 176 F.3d 239 (4th Cir.), *cert. denied*, 528 U.S. 911 (1999). The appellate court upheld the district court's decision not to group the defendant's attempted espionage and conspiracy to commit espionage convictions for sentencing purposes. The district court determined that the defendant's conduct was not a single course of conduct with a single objective as contemplated by USSG §3D1.2. The appellate court stated that counts which are part of a single course of conduct with a single criminal objective and represent one composite harm to the same victim are to be grouped together. However, if the defendant's criminal conduct constitutes single episodes of criminal behavior, each satisfying an individual–albeit identical–goal, then the district court should not group the offenses.

United States v. Walker, 112 F.3d 163 (4th Cir. 1997). The district court correctly calculated the defendant's sentence involving mail fraud and money laundering. The district court grouped the counts together pursuant to USSG §3D1.2(d) and applied the higher base offense level for money laundering under USSG §3D1.3(b). Along with other adjustments, the defendant received a four-level specific offense characteristic increase under the money laundering guideline because the fraudulent scheme involved between $600,000 and $1,000,000. The defendant argued that in determining his specific offense characteristic, the district court should have considered only $5,051.01 in fictitious interest payments specifically identified in the money laundering counts of the indictment. The government argued that all of the allegations in the mail fraud counts, which the defendant conceded involved $850,913.59, were incorporated into the money laundering counts by the grand jury. Furthermore, the facts of the case established that the mail fraud and money laundering crimes were interrelated. The Fourth Circuit held that the defendant's money laundering was part of the fraudulent scheme because the funds were used to make fictitious interest payments. Additionally, the circuit court found that the sentencing guidelines permitted the district court to use the amount of money the defendant obtained through mail fraud as the basis for calculating his specific offense characteristic under the money laundering guideline.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility[15]

United States v. Dickerson, 114 F.3d 464 (4th Cir. 1997). The district court erred in giving the defendant credit for acceptance of responsibility and for reducing his sentence pursuant to USSG §3E1.1. The district court improperly adjusted the defendant's sentence based on two grounds: the defendant saved both the court and the government real time in both having to go through with a jury trial; and the defendant never indicated at trial that he did not accept the fact that he lied. The guidelines make no distinction between a bench and a jury trial. The relevant distinction is between a defendant who puts the government to its burden of proof at trial and a defendant who does not request a trial. *See* USSG §3E1.1, comment (n.2). Additionally, the circuit court found that, at least in part, the defendant went to trial to attempt to prove that his lies to the grand jury were not "material." Because materiality is an essential element of any perjury offense, in asserting his lies were not "material," the defendant challenged his "factual guilt." For these reasons, the defendant did put the government to its burden and, therefore, the defendant was not entitled to an acceptance of responsibility reduction.

United States v. Hudson, 272 F.3d 260 (4th Cir. 2001). The Fourth Circuit reversed the district court‘s decision to grant the defendant a reduction in his sentence under USSG §3E1.1 because of his acceptance of responsibility. The defendant pled guilty to drug trafficking, 21 U.S.C. § 841(a)(1). However, because the Fourth Circuit found that the defendant had engaged in conduct that constituted obstruction to justice, the reduction was precluded.

United States v. Pauley, 289 F.3d 254 (4th Cir. 2002), *cert. denied*, 537 U.S. 1178 (2003). The district court did not err in its refusal to reduce the defendant’s base offense level for acceptance of responsibility. The appellate court held that there was no error because the defendant clearly did not accept responsibility. The court asserts that since USSG §3E1.1 states that “a the defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility.” Here, the defendant filed an appeal denying the amount of drugs ascribed to him by the court under a relevant conduct analysis and he also denied his culpability in the murders listed as relevant conduct by the court. The appellate court agrees with the district court that such denials do not constitute acceptance of responsibility.

United States v. Ruhe, 191 F.3d 376 (4th Cir. 1999). The defendant was convicted of conspiring to transport stolen property and aiding and abetting. The defendant appealed the district court’s denial of granting an adjustment for acceptance of responsibility, arguing that it was clear error for the district court to refuse to consider his polygraph evidence at sentencing given that such evidence clearly entitled him to a downward departure. The polygraph evidence, however, only indicated the defendant’s continued denial of responsibility because it only served as evidence that he did not realize that the property was stolen, *i.e.*, that he did not commit the

[15]Effective April 30, 2003, Congress, under the PROTECT Act, Pub. L. 108-21, directly amended this guideline by amending the criteria for the additional one level and incorporating language requiring a government motion. *See* USSG, App. C, Amendment 649.

crime for which he was charged. Consequently, the district court did not commit any error in denying the decrease for acceptance of responsibility.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Dixon, 230 F.3d 109 (4th Cir. 2000). Suspended time on a defendant's prior state convictions should not count as time served under the sentencing guidelines. The defendant was sentenced to serve 60 days in jail but only served 58 days in prison. Suspended sentences are counted by the time not suspended, rather than the time imposed. Thus, the defendant should have received only one criminal history point rather than the 2 which would correspond to a 60 day sentence.

§4A1.2 Definitions and Instructions for Computing Criminal History

United States v. Brown, 2005 U.S. App. LEXIS 436 (4th Cir. 2005). The appellate court upheld the district court's assessment of one criminal history point for a prior conviction of underage possession of alcohol. The appellate court dismissed the appellant's claim that underage possession was similar enough to the excluded offense of public intoxication, noting that the only similarity is the involvement of alcohol in both offenses. Affirmed.

United States v. Huggins, 191 F.3d 532 (4th Cir. 1999), *cert. denied*, 529 U.S. 1112 (2000). Section 4A1.2(a)(2) provides that prior sentences imposed in unrelated cases are counted separately, but prior sentences imposed in related cases are counted together as a single sentence, such as when they were consolidated for trial or sentencing. Although the defendant's two prior felony convictions were consolidated for sentencing, because there was an intervening arrest, the sentences were not related. *See* USSG §4A.1.2, comment. (n.3). Consequently, the two prior felony convictions properly were considered as separate for purposes of qualifying the defendant as a career offender under USSG §4B1.1(3).

United States v. Mason, 284 F.3d 555 (4th Cir. 2002). The district court erred when it used a juvenile sentence in a determination of the defendant's career offender status. Under Application Note 7 to §4A1.2, a conviction may only be counted if it was an adult conviction. Only convictions counted under §4A1.2 can be used for the purpose of determining career offender status under §4B1.1. According to USSG §4A1.2(d), because the defendant received a juvenile sentence for the robbery offense and it occurred more than five years prior to the instant offense, the court may not include it in determining the defendant's criminal history category or his career offender status. West Virginia law permits a juvenile to be sentenced in adult court as a juvenile, and the district court erred when it assumed that his juvenile sentence was an adult sentence simply because he had an adult conviction.

United States v. Stewart, 49 F.3d 121 (4th Cir. 1995). The district court erred by enhancing the defendant's criminal history pursuant to USSG §4A1.1(e) based upon his 24-day incarceration pending a state parole revocation hearing that resulted in neither revocation nor re-

incarceration. Although the defendant was found guilty of the parole violations, the Parole Commission did not revoke parole or reimpose a sentence, and he was released. The federal district court added two points to the defendant's criminal history pursuant to USSG §4A1.1(e) because it considered this detention to constitute "imprisonment on a sentence." The circuit court, however, construed USSG §4A1.1(e) to apply to the defendant only if his pre-revocation detention amounted to an extension or continuation of the original nine-year sentence for his 1983 conviction. The circuit court ruled that there was no basis for holding that the detention amounted to an extension of an original "imprisonment on a sentence" within the meaning of the guidelines, since the defendant's parole was not revoked and the defendant was not re-incarcerated. The circuit court further held that USSG §4A1.1(e) "does not contemplate the assessment of criminal history points on the basis of detentions of the defendants who are awaiting parole revocation hearings when those hearings do not result in re-incarceration or revocation of parole." The appellate court vacated the sentence and remanded the case for resentencing.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Bacon, 94 F.3d 158 (4th Cir. 1996). The district court erred in relying upon the defendant's allegation that newly discovered evidence proved his innocence of a prior state offense and in refusing to enhance the defendant's sentence as required under USSG §4B1.1. The court held that the district court was required to count the previous state offense as a predicate offense because the defendant did not allege that he was deprived of counsel or of any other constitutional right. Once a conviction is found to meet the requirements of a predicate offense under USSG §4A1.2, Application Note 6, it must be considered unless it has been reversed, vacated, or invalidated in a prior case. A defendant may not collaterally attack his prior conviction unless federal or constitutional law provides a basis for such an attack. As a policy matter, unrestricted challenges to predicate offenses would place a substantial burden upon prosecutors forced to defend the predicate offenses and judges forced to hear the appeals. The court vacated and remanded the sentence for recalculation characterizing the defendant as a career offender.

United States v. Fisher, 2005 U.S. App. LEXIS 136 (4th Cir. 2005). The defendant challenged the district court's assignment of criminal history points for a conviction under appeal to the state superior court and the court's calculation of drug quantities based on evidence in the PSR rather than that found at trial. Prior to sentencing in federal instant offense, the defendant appealed a state conviction for resisting a public officer to de novo jury trial in North Carolina state superior court. He was awaiting trial at the time of sentencing. USSG § 4A1.2 (l) provides that [i]n the case of a prior sentence, the execution of which has been stayed pending appeal, §4A1.1 (a),(b),(c),(d), and (f) shall apply as if the execution of such sentence had not be stayed. However, Fourth Circuit precedent held that such "appeals" are not appeals in the §4A1.1 sense since the appeal was not a review of the district court proceeding, but was instead a trial *de novo* irrespective of the proceedings or disposition of the inferior court. The appellate court further noted that per North Carolina law, an appeal from district court to superior court only stays portions of the sentence related to fines, costs and confinement. It does not stay probationary terms, thus defendant was serving his 12-month probationary sentence at the time

of sentencing, so the criminal history point was correctly assigned. As to the use of the PSR to determine drug quantity, the appellate court found that the district court relied on both the PSR and trial testimony to make its determination of drug quantity, and that the quantities presented in evidence at trial were such that even if the court relied only on the evidence presented at trial, there was more than enough quantity to justify the sentence imposed. The appellate court affirmed the sentence.

United States v. Johnson, 114 F.3d 435 (4th Cir.), *cert. denied*, 522 U.S. 903 (1997). For career offender calculation purposes, the date the prior conviction was sustained should control, not the date of later sentencing as a career offender. The defendant argued that the district court's sentencing of him as a career offender based on his prior conviction for assault on a female, which at the time of the defendant's conviction carried a maximum penalty of two years, could not be used in the career offender analysis because that offense now carries only a 150-day maximum. The defendant argued that North Carolina's recent amendment rendered his prior conviction ineligible for career offender calculations. As a case of first impression for the federal courts, the Fourth Circuit held that the date of the conviction pursuant to USSG §4B1.2(3) of the guidelines provides that the conviction is sustained on the date the guilt of the defendant is established. The defendant sustained his conviction for assault on a female in 1986. In 1986, that offense was punishable by a statutory maximum of two years. Thus, the assault conviction was properly considered a prior felony conviction for guideline purposes.

United States v. Johnson, 246 F.3d 330 (4th Cir.), *cert. denied*, 534 U.S. 884 (2001). The district court did not err in determining that possession of a sawed-off shotgun is a "crime of violence" for purposes of the career offender provisions of USSG §§4B1.1 and 4B1.2. The defendant appealed his sentence, arguing that one criterium was not satisfied. Specifically, he asserted that his New Jersey conviction for possession of a sawed-off shotgun was not a crime of violence within the definition in USSG §4B1.2(a) as it did not "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." In determining whether a crime fits the "otherwise clause," the court looks first to the indictment, and if that inquiry is unavailing, it determines whether the crime poses a risk of physical injury in the abstract. In this case, the indictment for the possession offense was not included in the record. The court, therefore, proceeded to the "in-the-abstract" inquiry and determined that the possession of a sawed-off shotgun "always creates a serious potential risk of physical injury to another." 246 F.3d 330 at 335. The court distinguished possession of a sawed-off shotgun from felony possession of a firearm, which the Fourth Circuit has ruled is not a crime of violence. The court agreed with the reasoning of the Seventh, Eighth, and Ninth Circuits that "sawed-off shotguns are 'inherently dangerous and lack usefulness except for violent and criminal purposes,'" and is a markedly different type of weapon. *Id.* at 334 (citations omitted).

United States v. Lawrence, 349 F.3d 724 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 171 (2004). The district court's decision to classify the defendant as a *de facto* career offender was affirmed. The Fourth Circuit noted that there were three possibilities a district court could follow when it found that the highest criminal history category, category VI, was inadequate or that the defendant would be considered a career offender, but for the defendant's successful challenge to a predicate offense. First, a district court could exercise its discretion not to depart. Second, a district court could determine the extent of a departure by extrapolating from the existing sentencing table and considering the appropriateness of successively higher categories

level by level. Finally, a sentencing court could, as the district court did in the instant case, directly depart to a sentencing range based on *de facto* career offender status, once the district court determined that a departure under USSG §4A1.3 was warranted and that the defendant's prior criminal conduct was of sufficient seriousness to conclude that he should be treated as a career offender. Furthermore, a district court could sentence a defendant as a *de facto* career offender when he had committed two crimes that would qualify as predicate crimes for career offender status, but for some reason could not be counted. *See United States v. Harrison*, 58 F.3d 115, 118 (4th Cir. 1995). A defendant could also be sentenced as a *de facto* career offender if two of the defendant's prior crimes of violence were consolidated for sentencing purposes and thus did not constitute two separate predicate offenses. *Id.*

United States v. Martin, 215 F.3d 470 (4th Cir. 2000). Bank larceny is not a crime of violence, even in the abstract, and therefore, the defendant was not eligible to be sentenced as a career offender.

United States v. Neal, 27 F.3d 90 (4th Cir. 1994). In considering an issue of first impression in the federal courts, the appellate court reversed the district court's sentencing calculation that included a New York state drug possession conviction for purposes of applying USSG §4B1.1, the career offender guideline. Section 4B1.1 requires the defendant to have at least two prior felony convictions for a crime of violence or a controlled substance offense. This court joined the Ninth, Fifth, Tenth and Eleventh Circuits in recognizing that simple possession of drugs is not considered a "controlled substance offense." The New York statute under which the defendant was convicted only required an intent to distribute for one section of the statute; the other sections pertain to simple possession. Because it was unclear which section of the statute applied to the defendant's convictions, it was improper for the court to count this conviction for purposes of applying the career offender guideline.

United States v. Pierce, 278 F.3d 282 (4th Cir. 2002). The Fourth Circuit concluded that the taking indecent liberties with a child was a "crime of violence" because it constituted a forcible sex offense and created a serious potential risk of physical injury.

United States v. Romary, 246 F.3d 339 (4th Cir. 2001). The district court erred in its determination of the defendant's career offender status under USSG §4B1.1 by not counting a 1987 conviction for breaking and entering for purposes of enhancing the penalty for a 1999 bank robbery conviction. The defendant had two prior felony convictions which met the definition of "crime of violence" for purposes of USSG §4B1.1. *See* USSG §4B1.2(a). One conviction from 1987 was challenged as not meeting the requirements of USSG §4B1.1. The original sentence for the 1987 conviction was a ten-year suspended imprisonment with five years of probation. The district court determined that this conviction could not be used in computing criminal history for the following reasons: 1) it was a suspended sentence and did not meet the definition of "sentence of imprisonment" in USSG §4A1.2(b)(2); 2) it could not be included in the USSG §4A1.2(e)(1) criteria that is applicable to "sentence[s] of imprisonment;" and 3) it could not be included under USSG §4A1.2(e)(2), which is applicable to suspended sentences, because it was not "imposed within 10 years.". The Fourth Circuit held that the district court erred by not considering that the sentence for the 1987 conviction was reactivated upon revocation of probation in 1992, thus placing the sentence within the definition in USSG §4A1.2(e)(1) because he was incarcerated and, thus, it became a "sentence of imprisonment." Because the

reimposition of the sentence dates back to the original conviction (1987), it still fell within the 15-year period required by USSG §4A1.2(e)(1). The reactivated sentence fit the requirement of a "sentence of imprisonment . . . *whenever imposed*, that resulted in the defendant being incarcerated during any part of such 15-year period." *See* USSG §4A1.2(e)(1) (emphasis added).

United States v. Sloan, 2004 U.S. App. LEXIS 25436 (4th Cir. 2004). The appellate court upheld sentence based on *de facto* career criminal finding. The defendant had committed nine robberies and was convicted of four of those, the other five being dismissed as a result of a plea bargain. The convictions resulted in nine criminal history points, and a rating as category IV. The district court departed upward per 4A1.3 to category VI on the basis of Application Note 3 of 4A1.2, which recognizes that the definition of related cases may "result in a criminal history score that under-represents the seriousness of the defendant's criminal history and the danger he poses to the public." The appellate court found that, although the district court mistakenly stated that three of Sloan's prior crimes received no criminal history points (they each received one), the record "amply supports the district court's decision to depart." The appellate court also dismissed the appellant's *Blakely* challenge to the upward departure based on judicial factfinding.

United States v. Stockton, 349 F.3d 755 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1695 (2004). A sentencing court may depart downward where a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that a defendant would commit further crimes. *See* USSG §4A1.3. The court noted that the same analysis applied when considering the classification as a career offender as over-representing the seriousness of his actual criminal history or his likelihood of recidivism. In the instant case, the defendant's criminal history reflected recidivism in controlled substance offenses; under such circumstances, an over-representativeness departure was almost never appropriate.

United States v. Williams, 29 F.3d 172 (4th Cir. 1994). The circuit court held that "convictions sustained subsequent to the conduct forming the basis for the offense at issue cannot be used to enhance a defendant's status to career offender." *See United States v. Bassil*, 932 F.2d 342 (4th Cir. 1991).

§4B1.2 Definitions of Terms Used in Section 4B1.1

United States v. Huggins, 191 F.3d 532 (4th Cir. 1999), *cert. denied*, 529 U.S 1112 (2000). Section 4A1.2(a)(2) provides that prior sentences imposed in unrelated cases are counted separately, but prior sentences imposed in related cases are counted together as a single sentence, such as when they were consolidated for trial or sentencing. Although the defendant's two prior felony convictions were consolidated for sentencing, because there was an intervening arrest, the sentences were not related. *See* USSG §4A.1.2, comment. (n.3). Consequently, the two prior felony convictions properly were considered separate for purposes of qualifying the defendant as a career offender for sentencing purposes.

See United States v. Payton, 28 F.3d 17 (4th Cir.), *cert. denied*, 513 U.S. 976 (1994), §2K2.1, p. 19.

§4B1.4 Armed Career Criminal

United States v. Cook, 26 F.3d 507 (4th Cir.), *cert. denied*, 513 U.S. 953 (1994). The district court erred in concluding that "obstruction of justice" cannot serve as a predicate offense under the Armed Career Criminal Act when the applicable state law broadly defines it to include violent and nonviolent means. The Supreme Court in *Taylor v. United States*, 495 U.S. 575 (1990), held that the district court may examine the "indictment or information and jury instructions" to determine whether the burglary for which the jury convicted the defendant was violent. In following the majority of courts of appeals, this court agreed that *Taylor* is not restricted to burglary offenses and may be applied to all predicate convictions. (Citations omitted.)

United States v. Letterlough, 63 F.3d 332 (4th Cir.), *cert. denied*, 516 U.S. 955 (1995). On appeal, the defendant argued that two of his prior convictions were not "committed on occasions different from one other." The two prior felony convictions consisted of two undercover drug sales made on July 31, 1990, to a single undercover police officer. The appellate court ruled that each of the defendant's drug sales was a complete and final transaction, and therefore, an independent offense, noting that Congress intended to include within the scope of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), only those predicate offenses that constitute an occurrence unto themselves. The circuit court recognized and adopted the test applied by the majority of the circuit courts to determine whether the ACCA applies to a defendant's prior crimes: convictions occur on occasions different from one another "if each of the prior convictions arose out of a `separate and distinct criminal episode.'" *United States v. Hudspeth*, 42 F.3d 1015, 1019 (7th Cir. 1994) (*en banc*) (emphasis in original), 63 F.3d 332 at 335, *cert. denied*, 515 U.S. 1105 (1995). The circuit courts have applied a number of factors to determine when more than one conviction constitutes a separate and distinct criminal episode, including "whether the offenses arose in different geographic locations; whether the nature of the offenses was substantively different; and whether the offenses involved multiple victims and multiple criminal objectives."

United States v. O'Neal, 180 F.3d 115 (4th Cir.), *cert. denied*, 528 U.S. 980 (1999). The district court did not err in sentencing the defendant as an armed career criminal under 18 U.S.C. § 924(e) and USSG §4B1.4. The district court relied on a 1977 North Carolina felony larceny conviction. The defendant argued that the conviction should not count because the government did not include the conviction in the notice it filed with the district court of its intent to seek an enhanced sentence. The appellate court concluded that the presentence report gave the defendant adequate notice that the 1977 conviction was a possible predicate conviction. The appellate court stated that "there is no requirement that the government list, either in the indictment or in some formal notice the predicate convictions on which it will rely for a section 924(e) enhancement. *See United States v. Alvarez*, 972 F.2d 1000 (9th Cir. 1992), *cert. denied*, 507 U.S. 977 (1993).

§4B1.5 Repeat and Dangerous Sex Offender Against Minors

United States v. Jarrett, 2004 U.S. App. LEXIS 26688 (4th Cir. 2004). The appellate court upheld the district court's five-level enhancement pursuant to USSG 4B1.5. The defendant challenged the enhancement as an impermissible *ex post facto* application of the guidelines in violation of USSG §1B1.11(b)(1). But the appellate court, relying on USSG 1B1.11 (b)(3)

found no violation: "If the defendant is convicted of two offenses, the first committed before and the second after, a revised edition of the Guidelines became effective, the revised edition is applied to be applied to both offenses." The court affirmed sentence.

CHAPTER FIVE: *Determining the Sentence*

Part B Probation

§5B1.4 Recommended Conditions of Probation and Supervised Release (Policy Statement)

United States v. Wesley, 81 F.3d 482 (4th Cir. 1996). The district court did not abuse its discretion in ordering the defendant to abstain from alcohol as a condition of supervised release. Pointing to *United States v. Prendergast*, 979 F.2d 1289 (8th Cir. 1992), the defendant contended that this condition deprived him of his liberty and freedom, and was not "fine tuned" as such restrictions on freedom should be. The circuit court distinguished this case, however, by indicating that the defendant in *Prendergast* did not have a history of alcohol abuse, while the defendant in this case has prior convictions for alcohol related offenses and had tested positive for drugs on various occasions. The circuit court joined with the First and Ninth Circuits in holding that this condition of supervised release was acceptable under such circumstances.

Part C Imprisonment

§5C1.2 Limitation on Applicability of Statutory Minimum Sentence in Certain Cases

United States v. Ivester, 75 F.3d 182 (4th Cir.), *cert. denied*, 518 U.S. 1011 (1996). The district court did not err in denying the defendant's request that he be sentenced under the safety valve provision of USSG §5C1.2. In denying the defendant's request, the district court found that the defendant had failed to provide the government with any truthful information concerning his crime. Although noting that a defendant cannot be denied section 3553(f) relief merely because the information provided to the government is not useful, the court determined that granting a section 3553(f) relief to defendants who are merely willing to be completely truthful would obviate the statutory requirement that defendants "provide" information. Therefore, defendants seeking to avail themselves of downward departures under USSG §5C1.2 bear the burden of affirmatively acting to ensure that the government is truthfully provided with all information and evidence the defendants have concerning the relevant crimes.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Alalade, 204 F.3d 536 (4th Cir.), *cert. denied*, 530 U.S. 1269 (2000). The appellate court held that the district court had no discretion under the Mandatory Victims Restitution Act of 1996 (MVRA) to order the defendant to pay restitution in an amount less than the full amount of each victim's loss by allowing an offset for the value of fraudulently obtained property the government seized from the defendant and retained in administrative forfeiture. On appeal, the defendant argued that the restitution amount should be offset by the amount seized by the government, relying upon pre-MVRA case law, holding that the district court has discretion to reduce the amount of restitution by amounts seized from the defendant in forfeiture proceedings. *See United States v. Khan*, 53 F.3d 507 (2d Cir. 1995). The appellate court examined the MVRA and noted that with the passage of the MVRA, Congress completely deleted the language of the Victim and Witness Protection Act affording the district court discretion to consider any factor it deemed appropriate in determining the amount of restitution to be ordered. The MVRA requires the district court to order restitution to each victim in the full amount of each victim's losses as determined by the district court. Thus, the appellate court held that the district court lacked discretion under the MVRA to offset the restitution amount by the value of the items seized by the government.

United States v. Dawkins, 202 F.3d 711 (4th Cir.), *cert. denied*, 529 U.S. 1121 (2000). The appellate court ordered the district court to recalculate the amount of loss and restitution.. The appellate court addressed the defendant's challenges to the restitution order to guide the district court on remand. The district court ordered the defendant to pay restitution in the full amount of the loss and a $200 special assessment, and stated that both were immediately due and payable in full. The district court also instructed that if the defendant is unable to pay restitution owed immediately, restitution shall be paid in installments of $200 dollars per month to begin 60 days after the defendant's release from prison. Furthermore, the probation officer shall take into consideration the defendant's economic status as it pertains to his ability to pay restitution ordered and shall notify the court of any changes that need to be made to the payment schedule. The appellate court concluded that the district court effectively discharged its statutory obligation to set a payment schedule when it instructed that if the defendant were unable to pay the full restitution amount immediately, he could pay 60 days after his release.

However, the appellate court did hold that the district court must make a finding that "keys Dawkins' financial situation to the restitution schedule ordered or finds that the order is feasible." The MVRA clearly requires a sentencing court to consider the factors listed in 18 U.S.C. § 3664(f)(2) and the court must make a factual finding keying the statutory factors to the type and manner of restitution ordered.

The appellate court concluded that the district court did not illegally delegate its judicial authority by allowing the probation officer to adust the restitution payment schedule after considering the defendant's economic status. The appellate court noted that a district court may not delegate to the probation officer the final authority to establish the amount of the defendant's partial payment of either restitution. *See United States v. Miller*, 77 F.3d 71 (4th Cir. 1996); *United States v. Johnson*, 48 F.3d 806 (4th Cir. 1995). Here, the district court ordered the probation officer to take Dawkins' financial situation into consideration and "notify the Court of any changes that may need to be made to the payment schedule." The appellate court concluded

that the court retained both the right to review the probation officer's findings and to exercise ultimate authority regarding the payment of restitution.

United States v. Ubakanma, 215 F.3d 421 (4th Cir. 2000). Pursuant to the Victim and Witness Protection Act of 1982, 18 U.S.C. § 3663, a court may order restitution only to victims of an offense for losses traceable to the offense of conviction. The court must also consider various other factors, including the amount of loss sustained by the victim.

United States v. Musleh, 106 Fed. Appx. 850 (4th Cir. 2004). The appellate court upheld the district court's upward departure based on enhanced loss calculation, but it vacated the district court's restitution order. The defendant fraudulently applied for a second social security number which he used to hide his increased wages from Department of Child Support Enforcement officials, resulting in a lower increase in his child support obligation than should otherwise have been the case. He was found guilty of four counts stemming from the fraudulent acquisition of the social security number and its use in acquiring a drivers licence. The district court applied the fraud guidelines to the case. The PSR found no identifiable victims or restitution issues, but the government moved for a six-level enhancement on the basis that the fraud facilitated the defendant's evasion of child support obligations in the amount of approximately $18,000. The district court granted the government's motion and, *sua sponte*, imposed restitution to the defendant's ex-wife and daughter. The appellate court, reviewing the grant de novo, determined that the departure was reasonable under the circumstances, and found that the district court's determination of loss was supported by a preponderance of the evidence. It also found that the district court's application of the perjury enhancement to account for the defendant's false statements to INS officials, was appropriate even though the conduct was not charged. The court finds the two level enhancement to be consistent with guideline offense levels for not only perjury, but also the other guidelines that could have applied, including USSG §§2B1.1 [Identity Fraud] and 2L2.2 [Fraudulently Acquiring Documents Related to Legal Resident Status]. The appellate court did take issue with the district court's *sua sponte* order of restitution, finding that the district court's no-notice imposition of restitution contravened the requirements of the Federal Rules of Criminal Procedure and failed to make the necessary factual findings regarding the financial resources of the defendant.

§5E1.2 Fines for Individual Defendants

United States v. Hairston, 46 F.3d 361 (4th Cir.), *cert. denied*, 516 U.S. 840 (1995). The district court must determine whether the defendant has proved his present and prospective inability to pay a fine. The appellate court stated that "the defendant cannot meet his burden of proof by simply frustrating the court's ability to assess his financial condition."

United States v. Hong, 242 F.3d 528 (4th Cir.), *cert. denied*, 534 U.S. 823 (2001). The defendant was convicted of one count of "failing to properly maintain and operate a treatment system and with 12 counts of discharging untreated waste water." *See* 33 U.S.C. §1319(c)(1)(A). The district court held that the maximum fine under section 1319 was $25,000 per day of violation and therefore no more than $300,000 for 12 counts. The district court relied on USSG §5E1.2(c)(3) and (4). Section 5E1.2(c)(3) is a table of the applicable fines, which sets the maximum fine possible at $250,000. However, this maximum is not applicable if "the defendant is convicted under a statute authorizing (A) a maximum fine greater than $250,000, or

(B) a fine for each day of violation. In such cases, the court may impose a fine up to the maximum authorized by the statute." USSG §5E1.2(c)(4). The district court agreed with the defendant's argument that USSG §5E1.2(c)(4) directed the court to look to the maximum penalty allowable under the statute of conviction, in this case $25,000 for each of the 12 counts. The government, on the other hand, understood the exception in USSG §5E1.2(c)(4) "as a directive that the guidelines do not provide any maximum fine when the statute of conviction authorizes a fine per day of violation." Under this interpretation, USSG §5E1.2(c)(4) does not require the application of the maximum fine provisions in the *statute of conviction*, but also allows *other statutes to apply by reference*. The support for this interpretation is found in Application Note 5, which states that "[s]ubsection (c)(4) applies to statutes that contain special provisions permitting larger fines; the guidelines do not limit maximum fines in such cases." USSG §5E1.2, comment (n.5). The Alternative Fine Statute, section 3571 of the Federal Criminal Code, also imposes maximum fines. Subsection (e) provides that when a statute of conviction does not impose a fine, or imposes one lower than the fine under section 3571, the statute of conviction has to exempt application of section 3571 by specific reference in order for its maximum to stand. The government argued, and the court agreed, that since the statute of conviction did not specifically exempt application of section 3571, the maximum fine under the alternative fine statute should apply–$100,000 per count. *See* 18 U.S.C. § 3571(b)(5).

United States v. Hyppolite, 65 F.3d 1151 (4th Cir. 1995), *cert. denied*, 517 U.S.1162 (1996). The district court did not abuse its discretion in imposing a $300,000 fine when the defendant refused to complete a personal financial statement for the presentence report and provided no evidence to show an inability to pay.

§5E1.4 Forfeiture

United States v. Najjar, 300 F.3d 466 (4th Cir.), *cert. denied*, 537 U.S. 1094 (2002). The court of appeals held that RICO forfeitures do not violate *Apprendi v. New Jersey* in that they do not increase penalties beyond the statutory maximum. Further, forfeitures are part of the punishment and sentencing determination and need not be submitted to jury.

Part G Implementing The Total Sentence of Imprisonment

§5G1.3 Imposition of Sentence on Defendant Subject to Undischarged Term of Imprisonment

United States v. Husband, 2005 U.S. App. LEXIS 431 (4th Cir. 2005). The district court sentenced a father charged with 17 counts of sexual exploitation of his minor adopted daughter and one count of transportation of child pornography to eight consecutive rather than concurrent sentences of 87 months, resulting in a total sentence of 696 months. The appellate court held that the district court erred in assigning consecutive sentences, but determined that the error was harmless since the district court made clear that if consecutive sentences were not affirmed, an upward departure which was warranted in this case and which would have resulted in a similar sentence. The appellate court also found that the district court erred in applying the 1995 guidelines to the offenses when the final element of the crime, that of transporting the tape across state lines, was accomplished in 2001. The court found this too was harmless error since the error favored the defendant with a lower range.

United States v. Johnson, 48 F.3d 806 (4th Cir. 1995). The defendant's sentence was vacated and remanded to the district court to apply USSG §5G1.3, where it was not clear from the record or the sentencing order whether the 46-month sentence was imposed to run concurrently or consecutively to the defendant's undischarged state sentence.

United States v. Mosley, 200 F.3d 218 (4th Cir. 1999). When using the 1995 or later editions of the sentencing guideline dealing with the imposition of a sentence on a defendant who is subject to an undischarged term of imprisonment, the district court is not required to calculate a hypothetical combined guideline range. Instead, a sentencing court need only consider the relevant factors that USSG §5G1.3(c) directs the court to consider. Prior to 1995, the Fourth Circuit had required district courts to create a hypothetical combined guideline range for a defendant and sentence the defendant within that range. *See United States v. Myers*, 66 F.3d 1364 (4th Cir. 1995). However, USSG §5G1.3 was amended in 1995 (Amendment 535) and now only requires courts to engage in a factor analysis before deciding whether to impose a sentence that is concurrent with, partially concurrent with, or consecutive to a prior undischarged term of imprisonment.

United States v. Puckett, 61 F.3d 1092 (4th Cir. 1995). The district court did not err by ordering that the defendant's sentence for the instant offense run consecutively to his parole revocation sentence. The circuit court found that although the district court did not specifically state that it was applying either USSG §5G1.3(c) or USSG §7B1.3, its reasoning indicates that the appropriate factors were considered under the relevant guidelines. The district court listed several factors that formed the basis of its decision to have the present sentence run consecutively, including the frequency of the defendant's drug convictions, the severity of his PCP offense, and the court's desire not to minimize the punishments for two different, unrelated drug offenses.

United States v. Van Metre, 150 F.3d 339 (4th Cir. 1998). The district court erred in relying upon Application Note 5 of USSG §5G1.3 to impose the statutory maximum term for solicitation on the defendant. The court of appeals held that the district court erroneously interpreted Note 5 to allow the imposition of the statutory maximum. Nothing in Note 5 allows the district court to depart from the applicable guideline range.

Part H Specific Offender Characteristics

§5H1.4 Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)[16]

United States v. Carr, 271 F.3d 172 (4th Cir. 2001), *cert. denied*, 142 S. Ct. 552 (2003). The Fourth Circuit dismissed a defendant's appeal after the district court refused to grant him a downward departure based on his physical impairment, AIDS. The court found that the district court's refusal to depart was not subject to appellate review because there was no misperception as to its authority to do so. The district court ruled that the impairment was not so extraordinary as to warrant departure under USSG §5H1.4 and agreed with the Government's contention that the prison system could sufficiently handle the defendant's illness.

United States v. Mills, 2005 U.S. App. LEXIS 987 (4th Cir. 2005). The district court acted within its discretion in denying defendant's motion for a downward departure pursuant to USSG § 5H1.4 in consideration of his medical condition which, at the time of sentencing, had deteriorated into full-blown AIDS. The appellate court noted that the "only circumstance in which review [of a district court's refusal to depart] is available when the district court mistakenly believed that it lacked the authority to depart." *citing United States v. Edwards*, 18 F.3d 230, 238 (4th Cir. 1999). The appellate court found no evidence to suggest that the district court mistakenly believed it did not have the authority to depart, either in the appellant's arguments or the court record. Appeal dismissed.

United States v. Spring 108 Fed. Appx. 116 (4th Cir. 2004). The appellate court vacated the district court's sentencing based on downward departure for six factors. Of the six, the appellate court found that only one factor justified departure. The sentencing court granted a downward departure on the defendant's motion on the following grounds: (1) diminished capacity, (2) overstated criminal history, (3) overstated seriousness of the offense, (4) extraordinary motive for committing the offenses, (5) unusually susceptible to prison abuse, and (6) the combination of all five factors as an independent factor. The appellate court found that the defendant had the ability "to understand the nature, quality, and wrongfulness of his actions and he had the capacity to conform his conduct to the requirements of the law." The appellate court also found that the sentencing court improperly gave a downward departure based on the overstating of criminal history, after sentencing on the basis of criminal history. It also dismissed the sentencing court's reasoning for finding the seriousness of the offense was overstated. The appellate court also questioned the sentencing court's finding of "extraordinary motive," analogizing the court's term with "distress" which is identified in the guidelines, but generally "does not warrant a decrease in sentence." USSG §5K2.12. The appellate court found merit in only the sentencing court's determination that the 5'6", 90 lb defendant was a past and potentially future target of prison abuse.

[16]Effective October 27, 2003, the Commission, in response to a congressional directive in the PROTECT Act, Pub. L. 108-21, amended this guideline by adding a prohibition against departures based on addiction to gambling. *See* USSG, App. C, Amendment 651.

§5H1.6 Family Ties and Responsibilities (Policy Statement)[17]

United States v. Wilson, 114 F.3d 429 (4th Cir. 1997). The district court abused its discretion in departing downward from the applicable guideline range. The defendant pled guilty to conspiracy to possess with the intent to distribute cocaine base. The district court held that the defendant was not entitled to a reduction in his sentence under USSG §2D1.1(b)(4). The district court, however, departed downward from the resulting guideline range because of the defendant's extraordinary family responsibilities. The circuit court found that the defendant's deprived background was a motivating force behind the decision of the district court to depart. The district court, recognizing that USSG §5H1.12 prohibited a departure based on disadvantaged upbringing, attempted to justify the departure USSG §5H1.6, based on family ties and the defendant's ability to take care of his own children. The circuit court found that the defendant's family circumstances were not so extraordinary as to justify the departure. The circuit court found that the district court improperly departed, and vacated the sentence and remanded for resentencing.

Part K Departures

Standard of Appellate Review—Departures and Refusals to Depart

United States v. Daughtrey, 874 F.2d 213 (4th Cir. 1989). The level of review for determining reasonableness of departures depends on whether issue is (1) correctness of the factual findings underlying the decision to depart; (2) relevance of a factor used to justify a departure; (3) the adequacy of the Commission's consideration of the factor in formulating the guidelines; or (4) the reasonableness of the extent of the departure. The more fact-driven the determination, the more deference given.

§5K1.1 Substantial Assistance to Authorities (Policy Statement)

United States v. Butler, 272 F.3d 683 (4th Cir. 2001). The defendant claimed that under 18 U.S.C. § 3553(e) and USSG §5K1.1, due to his substantial assistance, he was entitled to a downward departure. While the defendant provided the government with substantial assistance in the investigation and prosecution of a bank robbery, he had also threatened the life of a codefendant, causing the government's refusal to file a downward departure motion for him. The Fourth Circuit stated that under 18 U.S.C. § 3533(e) and USSG §5K1.1, district courts are permitted to "impose a sentence below the statutory minimum 'to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense," but the granting of such a sentence is a power, not a duty provided by the government. The Fourth Circuit held that the refusal was rationally related to a government interest because of three reasons: (1) the threats the defendant issued to his codefendants were rationally related to the type and quality of assistance he rendered; (2) even if the threats were not rationally related to the assistance he provided, it is not a relevant inquiry under *Wade v. United States*, 504 U.S. 181 (1992); and (3) the defendant's allegation of disparate treatment is legally irrelevant and factually incorrect. According to the court, "a defendant is not rendering

[17]Effective April 30, 2003, section 401(b)(5) of Pub. L. 108-21 (PROTECT Act) directly amended this policy statement to add the second paragraph. *See* USSG, App. C, Amendment 649.

'substantial assistance' if he is threatening the life of another government witness before his sentencing hearing."

United States v. Hill, 70 F.3d 321 (4th Cir. 1995). The defendant appealed the extent of the downward departure based on his substantial assistance to the government. He asserted that the district court's decision to reduce his base offense level by only two levels was based on its erroneous consideration of a prison term imposed on him by the district court in Texas. The appellate court concluded that the sentence did not result from an incorrect application of the guidelines, and the appeal was an artful attempt to gain review of the district court's exercise of discretion. As such, the appeal was dismissed.

United States v. Johnson, 393 F.3d 466 (4th Cir. 2004). The appellate court ruled that a district court, on motion from the government for a downward departure pursuant to 18 U.S.C. § 3553(e), can impose a sentence below the guideline range even if the defendant is subject to a statutory minimum sentence that exceeds the guideline range. The Fourth Circuit had held that § 3553(e) placed no limit on the court's authority to impose a sentence below the statutory minimum or the low-end of the guideline range as long as the extent of the departure was reasonable under 18 U.S.C. § 3742(e). *United States v. Wilson*, 896 F.2d 856 (4th Cir. 1990). The appellate court upheld the sentence imposed by the district court.

United States v. LeRose, 219 F.3d 335 (4th Cir. 2000). Absent a determination of an unconstitutional or irrational motive on the part of the government, it was error for a district court to grant a reduction for substantial assistance without a government motion. *See United States v. Schaefer*, 120 F.3d 505, 508 (4th Cir. 1997). The burden is on the defendant to make a substantial threshold showing that the government's refusal resulted from improper or suspect motives. *See Wade v. United States*, 504 U.S. 181, 186 (1992). In the instant case, the district court impermissibly shifted to the hearing portion of the *Wade* framework without first determining whether the defendant had met his threshold burden.

United States v. Pearce, 191 F.3d 488 (4th Cir. 1999). A district court's discretion to depart under USSG §5K1.1 is "broad" but limited in two ways: (1) the factors it considers must relate to "the nature, extent and significance of the defendant's assistance"; (2) the extent of any departure must be "reasonable." The defendants were career offenders who pled guilty to conspiracy to purchase cocaine. The district court erroneously held that once the government files a USSG §5K1.1 motion, the court has "total discretion." It then rejected the government's request for a three-level downward departure for each defendant and departed downward from an offense level of 26 to 2 for defendant Pearce, notwithstanding that his substantial assistance was limited to his participation in a single controlled narcotics purchase that was set up by defendant Chapman. Similarly, it lowered Chapman's offense level from 26 to 6 based upon his participation in one controlled purchase and his setting up the second purchase for Pearce. The Fourth Circuit reversed and remanded both cases for resentencing. With respect to Pearce, it noted that while the district court did not articulate the specific reasons for its departure, the counsels' arguments and evidence indicate that it apparently considered irrelevant factors; failed to give substantial weight to the government's evaluation; failed to give its reasons for departing; and based on the record, departed to an unreasonable extent. With respect to Chapman, the district court considered appropriate factors, but the 20-level departure was "unreasonable in extent" given his level of cooperation.

United States v. Pillow, 191 F.3d 403 (4th Cir. 1999), *cert. denied*, 528 U.S. 1177 (2000). The Fourth Circuit determined that the starting point for calculating a downward departure under USSG §5K1.1 and 18 U.S.C. § 3553(e) was the statutory minimum sentence–not what the guidelines would be absent the statutory minimum sentence. The defendant had been convicted by a jury of narcotics charges and was sentenced to the statutory minimum sentence pursuant to USSG §5G1.1. Thereafter, the government filed a §5K1.1 motion based upon the defendant's subsequent cooperation. The Fourth Circuit rejected the defendant's contention that section 3553(e) restored the otherwise applicable guideline range that would have applied absent the mandatory minimum sentence because the plain language of the statute "allows for a departure from, not the removal of, a statutorily required minimum sentence." Specifically, section 3553(e) provides for a sentence "below" a statutorily required minimum sentence (*i.e.*, a departure). In contrast, section 3553(f) (relating to the "safety valve") provides for a sentence "without regard" to any statutorily required minimum sentence. In dissent, Senior Judge Butzner noted that USSG §5K1.1 permits departure "from the guidelines" and that the low end of "the guidelines" was 188 months.

United States v. Ruffin, 2004 U.S. App. LEXIS 25223 (4th Cir. 2004). The appellate court remanded for resentencing because of an internal contradiction between the oral sentence (188 months) and the written sentence (180 months) issued by the district court. Although the appellant raised questions regarding the district court's statement that the sentence imposed departed downward from the guidelines based on substantial assistance, but in fact was within the guideline range, the appellate court did not take up the issue of the proper calculation of the substantial assistance departure, remanding only for a consistent judgment.

United States v. Wallace, 22 F.3d 84 (4th Cir.), *cert. denied*, 513 U.S. 910 (1994). The circuit court did not err in refusing the defendant's request to depart downward under USSG §5K1.1 based on the defendant's "substantial assistance" in order to enforce his plea agreement with the government. A court may not grant such a departure without a government motion unless 1) the government obligated itself in the plea agreement or 2) the refusal to make the motion was based on an unconstitutional motive. The plea agreement provided the government with the discretion to make such a motion if it determined it was warranted, but did not impose a binding obligation to do so.

§5K2.0 Grounds for Departure (Policy Statement)[18]

United States v. Bailey, 112 F.3d 758 (4th Cir.), *cert. denied*, 522 U.S. 896 (1997). The district court properly departed upward from the standard guideline sentence for kidnapping. The district court found four aggravating factors which it used to justify the upward departures and the defendant's increased sentence including §§5K2.2 (physical injury), 5K2.8 (extreme conduct), 5K2.5 (property damage), and 5K2.4 (abduction or unlawful restraint). The defendant

[18]Effective April 30, 2003, Congress, under the PROTECT Act, Pub. L. 108-21, directly amended this guideline by adding language to reflect the limitations on downward departures for crimes involving children or sexual offenses to grounds that are specifically listed in the guidelines. The appellate standard of review also has been amended effective April 30, 2003, by the PROTECT Act, 18 U.S.C. § 3472(e). *See* USSG App. C, Amendment 649.

objected to the consideration of §5K2.2 as a ground for departure because §2A4.1(b)(2) of the guidelines under kidnapping provides for a four-level increase if the victim sustained permanent or life-threatening bodily injury. The Fourth Circuit held that the extent of the upward departure should ordinarily depend on the extent of the injury, the degree to which it may prove to be permanent, and the extent to which the injury was intended. When the victim suffers a major permanent disability, and when such an injury was intentionally inflicted, a substantial departure may be appropriate. Similarly, the defendant objected to the use of USSG §5K2.4 because the crimes of kidnapping and domestic violence contain the elements of abduction and unlawful restraint. The circuit court held that because of the egregious nature of the restraint in this case, being held captive in the trunk of a car for an extended period of time, a departure based on USSG §§5K2.2 and 5K2.5 was completely reasonable. Additionally, the defendant argued that a departure under USSG §5K2.5 was erroneous because the four-level adjustment for a permanent or life-threatening bodily injury mentioned in USSG §2A4.1(b)(2) obviated the use of USSG §5K2.5 because in every case involving serious injury, there will always be significant medical expenses. The district court rejected this argument and held that the district court correctly referred to USSG §5K2.5 due to the massive future medical expenses involved. Lastly, the defendant argued that the use of USSG §5K2.8 was unwarranted because the facts underlying the finding of extreme conduct were erroneous. The circuit court rejected this argument, holding that even in the light most favorable to the defendant, the defendant's conduct was intentionally brutish, cruel, and extreme.

United States v. Fenner, 147 F.3d 360 (4th Cir.), *cert. denied*, 525 U.S. 1030 (1998). The district court properly concluded it could not base a downward departure on the increase in sentencing range that resulted from application of a cross-reference. The defendants had been charged with and acquitted of the murder of a co-conspirator in a drug distribution conspiracy. They were later convicted on federal drug and firearms charges. At sentencing, the district court found that they were responsible for the murder and applied the cross-reference to the homicide guidelines contained in USSG §2K2.1(c)(1)(B). The district court ruled that although application of the cross-reference resulted in rather large enhancements of the guideline ranges, it lacked authority to depart downward. The court of appeals viewed the enhancement resulting from application of a cross-reference as an unmentioned departure factor. The language of the cross-reference plainly indicates that when a firearm is illegally possessed in connection with another offense from which death results, the sentencing court must enhance the defendant's sentence in accordance with the homicide guidelines if that sentence is greater than that calculated without reference to the homicide guidelines. Thus, the guidelines take into account that the application of the cross-reference will result in an enhanced guideline range.

United States v. Gold, 114 Fed. Appx 553. 2004 U.S. App. LEXIS 23920 (4th Cir. 2004). The appellate court reversed the district court's grant of a downward departure for government coercion of a pedophile. The appellate court found that the FBI's impersonation of a 13-year-old girl on line was "run of the mill" persuasion, "enticing, as opposed to threatening, words," that did not remove the case from the guideline's heartland. Reversed and remanded for resentencing.

United States v. Hairston, 96 F.3d 102 (4th Cir. 1996), *cert. denied*, 519 U.S. 1114 (1997). The district court abused its discretion in granting a downward departure based on the defendant's "extraordinary restitution." The defendant, through the generosity of friends, repaid the bank she had embezzled $250,000 to settle her civil liability. The district court determined

that her efforts merited a five-level departure for "extraordinary restitution." The circuit court concluded that because the guidelines already take restitution into consideration in the context of a sentence reduction for acceptance of responsibility, restitution is a discouraged factor that can support a departure only if the restitution in a particular case demonstrates an extraordinary acceptance of responsibility. *See United States v. Hendrickson*, 22 F.3d 170 (7th Cir.), *cert. denied*, 513 U.S. 878 (1994). Here, the court found that the defendant's restitution was not extraordinary as it equaled less than half the amount she embezzled and came not from her funds, but from the generosity of friends.

United States v. Matthews, 209 F.3d 338 (4th Cir.), *cert. denied*, 531 U.S. 910 (2000). The defendant contended that the Supreme Court's decision in *Koon v. United States*, 518 U.S. 81 (1996), overruled Fourth Circuit precedent that held as unreviewable district court refusals to downwardly depart. The appellate court noted that prior to *Koon*, the Fourth Circuit had joined seven other circuits in ruling that the factual findings underlying a district court's refusal to depart downward could be reviewed only when the district court was under the mistaken impression that it lacked the authority to depart. As *Koon* addressed the issue of the appropriate standard of review to be applied to a district court's decision to depart, and not the review of a district court's decision not to depart, *Koon* did not overrule circuit precedent.

United States v. Myers, 66 F.3d 1364 (4th Cir. 1995). The district court erred in departing for physical injury because it was taken into account under USSG §2B3.1(b)(3)(C) in determining the guideline range, and the district court made no finding that that adjustment was not sufficient. However, the appellate court was convinced that the district court's reliance on this ground did not affect the sentence imposed. The "reliance on physical harm as a factor in the upward departure decision was harmless."

United States v. Perkins, 108 F.3d 512 (4th Cir. 1997). The district court erred in granting a downward departure to the defendant. At sentencing, the defendant was granted a downward departure from the applicable guidelines range of 292 months to 240 months, based on three justifications: comparatively lenient treatment of similarly culpable codefendants; unwarranted racial disparity in sentencing stemming from the fact that most of the codefendants are white and the defendant is black; and a shorter sentence more accurately reflects the defendant's relative culpability. The Government appealed the departure. Disparate sentences among codefendants is not a permissible ground for departure. *See United States v. Withers*, 100 F.3d 1142, 1149 n.3 (4th Cir. 1996), *cert. denied*, 520 U.S. 1132 (1997) (noting unanimous agreement that such departures are impermissible among circuits which have addressed the issue). With respect to the racial disparity claim, the circuit court stated that race can never be a basis for a departure. *United States v. Rybicki*, 96 F.3d 754, 757 (4th Cir. 1996); §5H1.10. As for a departure based on "relative culpability," the circuit court dismissed this argument stating that such departures would circumvent the district court's factual determinations. The sentence was vacated and the case was remanded to the district court for resentencing within the applicable guideline range.

United States v. Pitts, 176 F.3d 239 (4th Cir.), *cert. denied*, 528 U.S. 911 (1999). The district court did not err in departing upward one level based upon the district court's finding that the defendant's abuse of trust was extraordinary. The defendant was an FBI agent who sold confidential information to Russia. The district court applied the two-level abuse of trust

enhancement pursuant to USSG §3B1.3, and then departed upward one level for extraordinary abuse of trust. The appellate court stated that an upward departure based upon an extraordinary abuse of trust is warranted if the combination of the level of trust violated by the defendant and the level of harm created solely by the violation of that trust falls outside the heartland of cases that qualify for the enhancement. Here, the level of trust placed in the defendant was unmatched. He was a supervisory special agent of the FBI and a foreign counterintelligence operative whose job was to thwart the espionage activities of the very foreign intelligence service with whom he conspired. In violating that "awesome responsibility and trust," the defendant violated a level of trust to which most men are never exposed. The defendant presented several other espionage cases where more harm followed in which the sentencing court did not depart based upon abuse of trust. The appellate court rejected this reasoning, concluding that the harm resulting from the actual offense is irrelevant to a decision to depart based upon an extraordinary abuse of trust. The relevant harm is the harm created by the violation of trust.

United States v. Weinberger, 91 F.3d 642 (4th Cir. 1996). The district court erred in departing downward based on the defendant's exposure to civil forfeiture. The defendant was convicted of submitting fraudulent claims to Medicaid and Medicare. Under the plea agreement, the defendant was to pay restitution of $545,000. However, in a consent judgment in a civil forfeiture action, the defendant agreed to forfeit over $600,000 which was credited against the restitution in the plea agreement. The district court departed downward under USSG §5K2.0 because the defendant had payed a sum "beyond" complete restitution. The circuit court reversed, holding that exposure to civil forfeiture is not a basis for a downward departure. The court noted that forfeiture was considered by the Sentencing Commission and was intended to be in addition to, and not in lieu, of imprisonment. Additionally, civil forfeiture actions do not suggest any reduced culpability or contrition on the part of a defendant that might warrant a sentence reduction. The circuit court concluded that the district court's departure was an error of law and therefore, an abuse of discretion.

§5K2.1 Death (Policy Statement)

United States v. Terry, 142 F.3d 702 (4th Cir. 1998). The district court abused its discretion by departing upward four levels in determining the defendant's sentence for two counts of reckless involuntary manslaughter and an additional uncharged death. The circuit court held that the additional uncharged death of a participant in the aggressive driving could provide a basis for upward departure, even though that victim had been "an active participant in the activity that resulted in his death." However, the sentencing court erred by failing to make additional findings of fact to support the extent of the departure. The court noted that the defendant would have received a one-level increase for the third death under the sentencing guidelines' grouping rules. *See* §3D1.4. The guidelines provide that the extent of an upward departure for death "should depend on the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflects the risk of personal injury." The circuit court noted that the sentencing court failed to make findings as to the defendant's state of mind to establish the existence of malice. Remanded.

United States v. Van Metre, 150 F.3d 339 (4th Cir. 1998). The district court did not err in departing upward based on the murder of the victim in a kidnaping case. The court of appeals held that, unless USSG §2A4.1 of the 1990 guidelines takes into account the death of the kidnaping victim as occurred in the instant case, the court could upwardly depart based on USSG §5K2.1. The guideline specifically provides for other circumstances such as holding the victim for ransom or with a deadly weapon or for a prolonged period. It also provides an adjustment if the kidnaping was done to facilitate the commission of another offense. In this case, however, the victim was kidnaped for the purpose of sexual assault and only later did the defendant form the intent to murder her. The guideline does not take into account this scenario. Therefore, an upward departure to life imprisonment based on the victim's death was not an abuse of discretion.

§5K2.3 Extreme Psychological Injury (Policy Statement)

United States v. Terry, 142 F.3d 702 (4th Cir. 1998). The defendant was convicted of two counts of involuntary manslaughter for the deaths of two commuters who died when he lost control of his car while he was engaging in aggressive driving. The circuit court held that the sentencing court abused its discretion in departing upward three levels for the extreme psychological injury to the family members of the victims who were killed. Although a departure for psychological injury to a victim is "not limited to the direct victim of the offense of conviction" but can also apply to indirect victims, an indirect victim is a victim "because of his relationship to the offense, not because of his relationship to the direct victim." As an example, the court noted that bank tellers and bank customers may be indirect victims of a bank robbery. Here, the court held that there was no "evidence that the families in question had any relationship to the offense beyond their relationship to the direct victims." The family members were not victims of the offense of conviction.

§5K2.8 Extreme Conduct (Policy Statement)

United States v. Bonetti, 277 F.3d 441 (4th Cir. 2002). The district court did not err in departing one level upward from the applicable sentencing guideline finding that the duration of the offense was outside the "heartland" of the offense of harboring an unlawful alien, that this constituted "extreme conduct" and that it constituted "grounds for departure." The appellate court held that the decision to depart from a particular guideline must be made based on a five-step analysis: (1) a determination of the circumstances and consequences of the offense, (2) whether any of those circumstances are atypical enough to remove them from the "heartland" of the offense, (3) whether the factor is a forbidden, encouraged, discouraged, or unmentioned basis for departure, (4) assuming it is an encouraged factor, whether the guideline has already accounted for the factor, and (5) whether a departure based on these factors is in fact warranted. The defendant was convicted of conspiracy to harbor an illegal alien and of harboring an illegal alien. The circumstances of the case were such that the appellate court held that a determination that this fell outside the "heartland" of cases was appropriate thereby possibly warranting an upward departure. The unlawful alien in question was brought to the United States by the defendant. She was completely dependant on the defendant as she did not speak the language, did not have control over her own passport or visa, and was illiterate. The defendant and his wife kept her in virtually slave-like conditions, they did not pay her, forced her to work as many as 15 or more hours a day, and the defendant's wife regularly abused her. The district court classified the defendant's conduct as "extreme conduct." Under USSG §5K2.8, extreme conduct

includes prolonging a victim's pain or humiliation. In this case, the defendant held her for more than 15 years in essentially forced servitude which the appellate court agreed rose to the level of extreme conduct. Upon its finding that the defendant's conduct constituted "extreme conduct" under §5K2.8 the district court only had to determine that the duration prolonged the victim's pain and humiliation. The appellate court held that there was no abuse of discretion in the district court's finding that it did.

§5K2.13 Diminished Capacity (Policy Statement)[19]

United States v. Bowe, 257 F.3d 336 (4th Cir. 2001). The district court erred in denying government's motion to nullify the plea agreement and in granting a USSG §5K2.13 departure for diminished capacity. In the plea agreement both the government and the defendant stipulated to an adjusted offense level of 15, both parties agreed to argue for a sentence only within the stipulated range, and the defendant waived the right to contest either a conviction or the sentence in any post-conviction action. At the sentencing hearing, the defendant argued that he suffered from diminished capacity at the time of the crime, that this fact was not known at the time that he entered the plea agreement, and that the court should, therefore, grant a USSG §5K2.13 discretionary departure for diminished capacity.[20] The court allowed the defendant's counsel to argue for such a departure and to present evidence of the diminished capacity. The government argued that presenting such evidence and making the suggestion to the court to depart downward constituted a breach of the plea agreement. The court disagreed and denied government's motion to nullify the plea agreement. The appellate court found error on both grounds, concluding that the defendant breached the plea agreement and that the district court needed to either accept the agreed-upon level or allow the government to nullify the agreement and try the defendant.[21] It further concluded that the defendant did not satisfy the criteria set forth in USSG §5K2.13, which states that if "the offense involved actual violence or a serious threat of violence," then "the court may not depart below the applicable guideline range." Because these circumstances involved violence and serious threats of violence, the decision to depart was no longer discretionary and the district court erred in granting the departure.

United States v. Brandon, 247 F.3d 186 (4th Cir. 2001). The district court erred in its determination that the defendant was a career criminal under 18 U.S.C. § 924(e)(1) and in applying the corresponding enhancement to his sentence. The defendant pled guilty to unlawful possession of a firearm and received a 180-month sentence, reflecting the enhancement under section 924. The defendant challenged this enhancement on the basis that one of the three required convictions did not meet the criteria set forth in section 924, namely that it was "an offense under state law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of

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[19]Effective April 30, 2003, Congress, under the PROTECT Act, Pub. L. 108-21, directly amended this guideline by adding language prohibiting departures for diminished capacity and for aberrant behavior in certain child crimes and sexual offenses. *See* USSG App. C, Amendment 649.

[20]The defendant had also previously filed a formal response to the recommendations in the PSR. The response was withdrawn after defendant was notified by the government that it constituted a breach of the plea agreement.

[21]The appellate court concluded that it had jurisdiction to hear the government's appeal because the breach of agreement resulted in nullifying the government's implied reciprocal waiver of appeal.

imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). The statute relevant to the prior conviction criminalized possession and not possession *with intent* to distribute. The court held that in cases where the intent was not charged as an element of the crime, the inquiry turns to whether it can be inferred from the crime in the abstract. This inference can be made by using the quantity of drugs possessed as an indication of whether the defendant intended to distribute the drugs. The statute of the defendant's prior conviction penalized possession of 28 to 200 grams of cocaine. Given the broad range, the court determined that it was impossible to infer intent to distribute at all points in the spectrum when considering the crime of possession in the abstract. The court also rejected the possibility of looking to the quantity stipulated in the PSR as impermissible under circuit precedent, but nevertheless held that possession 35 grams of cocaine was not a sufficient amount to infer intent to distribute. The conviction did not satisfy the criteria for the enhancement, and thus, the court was left with only two qualifying prior convictions, a number insufficient to classify the defendant as a career criminal.

§5K2.14 Public Welfare (Policy Statement)

United States v. Terry, 142 F.3d 702 (4th Cir. 1998). The circuit court remanded the case to allow the sentencing court to determine whether the danger created by the defendant's reckless conduct while driving was outside the "heartland" of the typical reckless driving involuntary manslaughter case. The circuit court noted that reckless driving is already taken into account by the involuntary manslaughter guideline. *See* USSG §2A1.4(a)(2). On remand, the sentencing court must determine whether the defendant's reckless driving was "present to an exceptional degree" or was in some other way different from the ordinary case where the factor is present.

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

§7B1.3 Revocation of Probation or Supervised Release (Policy Statement)

United States v. Clark, 30 F.3d 23 (4th Cir.), *cert. denied*, 513 U.S. 1027 (1994). The district court erred in refusing to apply the provisions of 18 U.S.C. § 3583(g), which in this case would have required the defendant to receive a sentence of at least one year in prison. The government presented positive evidence that the defendant had used a controlled substance during his term of supervised release. Instead of sentencing the defendant to one year in prison pursuant to 18 U.S.C. § 3583(g), the district court sentenced the defendant to nine months and eight days in prison pursuant to USSG §7B1.4. To support the sentence, the district court reasoned that 18 U.S.C. § 3583(g) was "too harsh in the circumstances and that it limited the court's sentencing discretion too much." The government appealed, asserting that 18 U.S.C. § 3583(g), not USSG §7B1.4, was applicable to the defendant's case. Agreeing with the government, the Fourth Circuit held that the application 18 U.S.C. § 3583(g) was indeed required. The Fourth Circuit stated that "once a district court credits laboratory analysis as establishing the presence of a controlled substance, possession under section 3583 `necessarily follows.'" *United States v. Courtney*, 979 F.2d 45, 49 (5th Cir. 1992).

United States v. Pierce, 75 F.3d 173 (4th Cir. 1996). The court noted that the Assimilated Crime Act ("ACA") provides that a person who commits a state crime on a federal enclave shall be subject to a "like punishment." "Like punishment" requires only that the punishment be similar, not identical. The court noted that although the state statute does not authorize supervised release, it authorized parole. Supervised release was similar enough to parole that a term of supervised release did not violate the ACA's requirement that the defendant be subject to "like punishment." *Cf. United States v. Reyes*, 48 F.3d 435, 437-39 (9th Cir. 1995). The court further noted that, although the total sentence did exceed the maximum term of imprisonment authorized by the state statute, under the federal system, supervised release is not considered to be a part of the incarceration portion of a sentence. Therefore, supervised release under the ACA may exceed the maximum term of incarceration provided for by state law.

United States v. Woodrup, 86 F.3d 359 (4th Cir.), *cert. denied*, 519 U.S. 944 (1996). The district court did not err in imposing a 24-month sentence for the revocation of the defendant's supervised release and then imposing a consecutive 240-month sentence for the bank robbery upon which the revocation was based. The defendant argued that the imposition of both sentences violated the Double Jeopardy Clause. In rejecting the defendant's argument, the appellate court noted that when a defendant violates the terms of his supervised release, the sentence imposed is an authorized part of the original sentence. The court noted that this conclusion is supported by the fact that the full range of protections given to a criminal defendant is not required for the revocation of supervised release. The imposition of a sentence upon revocation of supervised release is not a punishment for the conduct prompting the revocation, but a modification of the original sentence for which supervised release was authorized. Analogously, courts have consistently held that subsequent punishment for conduct that gave rise to the revocation of probation does not violate double jeopardy. *United States v. Hanahan*, 798 F.2d 187, 189 (7th Cir. 1986). The Fourth Circuit joined the Ninth Circuit, the only other circuit court to consider this issue, in holding that the sentencing of a defendant for criminal behavior that previously served as the basis for revocation of supervised release does not violate the Double Jeopardy Clause. *See United States v. Soto-Olivas*, 44 F.3d 788, 792 (9th Cir.), *cert. denied*, 515 U.S. 1127 (1995).

§7B1.4 Term of Imprisonment (Policy Statement)

See United States v. Clark, 30 F.3d 23 (4th Cir.), *cert. denied*, 513 U.S. 1027 (1994), §7B1.3, p. 53.

United States v. Davis, 53 F.3d 638 (4th Cir. 1995). Chapter Seven policy statements regarding the revocation of supervised release are advisory in nature and are not binding on the courts.

United States v. Denard, 24 F.3d 599 (4th Cir. 1994). Title 18 U.S.C. § 3565(a) provides that when a probationer is found in possession of a controlled substance, "the court shall revoke the sentence of probation and sentence the defendant to no less than one-third of the original sentence." The "original sentence" is the defendant's original guideline imprisonment range. Therefore, the sentence must be at a minimum one-third of the maximum sentence in his original guideline range and at a maximum the guideline's maximum. This decision is consistent with *United States v. Granderson*, 511 U.S. 39 (1994). Although this rule may provide a sentence

that is inconsistent with the probation revocation tables in USSG §7B1.4, the policy statements contained in Chapter Seven are intended to provide guidance and are not binding on the courts.

United States v. Walker, 2005 U.S. App. LEXIS 137 (4th Cir. 2004). The appellate court upheld the district court's determination that drug use during the supervised release period of a bank robber constituted a Grade B violation. The appellate court, reviewing for plain error, saw nothing in the "nonbinding advisory guide" of USSG §7B1.4 (*citing United States v. Davis*, 53 F.3d 638, 642 (4th Cir. 2004), that would suggest the district court made a plain error if it made any error at all).

CHAPTER EIGHT: *Sentencing of Organizations*

Part C Fines

§8C2.5 Culpability Score

United States v. Brothers Construction Company of Ohio, Inc., 219 F.3d 300 (4th Cir.), *cert. denied*, 531 U.S. 1037 (2000). The defendant corporations were convicted of conspiracy to defraud the United States, two counts of wire fraud, and one count of making a false statement. Defendant Tri-State Asphalt Corporation received a $500,000 fine; defendant Brothers Construction Company received no fine due to insolvency. Tri-State appealed, *inter alia*, the district court's imposition of a three-level sentencing enhancement for obstruction of justice. *See* USSG §8C2.5(e). The district court found, in imposing the enhancement, that an agent of Tri-State had made a false statement in a letter to investigators, and given perjurous grand jury testimony, regarding the organization's compliance with a state program fostering the development of disadvantaged business enterprises. Tri-State argued that the enhancement constituted double counting insofar as the letter constituted the act for which Tri-State was convicted of conspiracy to defraud and making a false statement. The appellate court held, however, that because the district court identified another separate, independent basis for applying the obstruction of justice enhancement, namely, the grand jury testimony, the enhancement was not erroneous. Further, the district court's finding that the grand jury testimony was false as to a material fact and was willfully given to obstruct justice was not clearly erroneous.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11

United States v. Cannady, 283 F.3d 641 (4th Cir.), *cert. denied*, 537 U.S. 936 (2002). The district court did not err by making comments during the plea proceeding since those comments did not rise to the level of participation in plea negotiations. The defendant pled guilty to conspiracy to distribute and possession with intent to distribute cocaine and heroin. Included in the plea agreement was a waiver of the defendant's right to initiate proceedings under 28U.S.C. § 2255. The government informed the defendant that the waiver provision was required by the judge for all plea agreements and the defendant agreed. At the plea proceeding the judge told the defendant that if he did not agree to the waiver there would be no agreement. Rule 11(e)(1) provides that the attorneys for the defendant and the government may participate in plea negotiations but the judge may not. The appellate court held that since the parties had

negotiated and signed a plea agreement before the judge became involved, his comments could not be "with a view toward reaching a plea agreement"–the definition of participation under Rule 11(e)(1). Furthermore, the appellate court held that there was nothing coercive about the judge's comments during the plea proceeding–rather the judge was encouraging the defendant to make a decision whether to plead guilty or go to trial; the choice was his.

United States v. Carr, 271 F.3d 172 (4th Cir. 2001), *cert. denied*, 121 S. Ct. 552 (2003). The district court erred in its determination that there was a sufficient factual basis to support the defendant's guilty plea to one of the counts with which he was charged and remanded the case to the district court. At the Rule 11 hearing, the defendant was asked, "Did you as charged in Count 1 set fire to a building in order to damage it and the building was property used by another in or effecting [sic] interstate commerce and you did this intentionally"? To which the defendant replied, "Yes, sir." Because, it is unclear whether his response referred to his own actions and not to his knowledge of use of the property in interstate commerce, the court held that this evidence was not enough to support the guilty plea and vacated the judgment of conviction.

United States v. General, 278 F.3d 389 (4th Cir.), *cert. denied*, 535 U.S. 949 (2002). The district court did not err by not reciting the mandatory minimum during the plea hearing. The appellate court held that although the district court must inform the defendant of any statutory mandatory minimums before accepting a guilty plea failure to do so orally may not violate the defendant's substantial rights. Since the plea agreement itself provided all the information the defendant would have gotten from the court, the appellate court held that there is no Rule 11 violation. The appellate court reviewed the totality of the circumstances and held that because the defendant was informed of his appellate rights and that those rights could be waived in a plea agreement, was represented by counsel, and the waiver was unambiguous and plain within the plea agreement, the waiver was knowing, voluntary, and thus valid.

United States v. Goins, 51 F.3d 400 (4th Cir. 1995). The trial court erred in failing to inform the defendant during the Rule 11 hearing that a guilty plea would result in a mandatory minimum sentence. The defendant had not been aware of the mandatory minimum sentence until the presentence report was prepared, nearly three months after the plea had been accepted. The circuit court held that a violation cannot be considered harmless if the defendant had no knowledge of the mandatory minimum at the time of the plea. In considering this issue of first impression, the Fourth Circuit joined the Fifth and Eleventh Circuits in concluding that a district court's failure to inform the defendant of the mandatory minimum is reversible error. *See United States v. Watch*, 7 F.3d 422 (5th Cir. 1993); *United States v. Hourihan*, 936 F.2d 508 (11th Cir. 1991).

United States v. Good, 25 F.3d 218 (4th Cir. 1994). The district court's failure to explain to the defendant the significance of supervised release amounted to harmless error. Although he was advised of the possible minimum and maximum penalties, the defendant claimed that he was unaware when he pled guilty that his punishment could include additional incarceration if he violated the terms of his supervised release. He argued that since 21 U.S.C. § 841(b)(1)(B) only provides for a minimum period of supervised release, the judge could extend his supervised release term to life and thereby expose him to the possibility of prison for life. The circuit court concluded that the maximum supervised release time for a first offender guilty of a class B felony is five years. USSG §5D1.2 provides for a term that is at least three years but not more than five years or the minimum period required by statute, whichever is greater, for a defendant

convicted under a statute that requires a period of supervised release. The lower court's failure to warn him of this conclusion was harmless error because "the combined sentence of incarceration and supervised release actually received by the defendant is less than the maximum term he was told he could receive." *United States v. Moore,* 592 F.2d 753, 756 (4th Cir. 1979).

United States v. Martinez, 277 F.3d 517 (4th Cir.), *cert. denied*, 537 U.S. 899 (2002). The district court erred in advising the defendant of incorrect potential penalties during his plea hearing and by failing to advise the defendant that he could not withdraw his plea after sentencing. However, the appellate court held that the errors were not reversible because there was no evidence that the defendant might have changed his plea in light of the omitted information. The appellate court held that the district court erred by telling the defendant that he was subject to a ten-year minimum sentence and a maximum sentence of life. In light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this information was incorrect.

Additionally, the appellate court held that even though the district court made it clear to the defendant that it was not bound by the government's recommendation, it did not make sure that he understood that he would not be free to withdraw his plea.

The district court did not err in adopting the presentencing report as a factual basis for the guilty plea. The appellate court held that as long as the court has a reasonable basis to determine that there was sufficient factual basis for the guilty plea there will be no error. The presentencing report constitutes such a factual basis.

Although the appellate court held that the district court erred in several respects under Rule 11 and that those errors were plain, the court further held that the defendant failed to demonstrate that either error affected his substantial rights–the third prong of a plain error analysis. The appellate court held that the defendant must show that absent the errors made by the court, he would not have agreed to the plea agreement. Because the defendant was facing multiple charges, many of which were dropped through the plea agreement, it is unlikely that he would have changed his mind about the agreement based on a different potential sentence for only one of the remaining charges.

United States v. Thorne, 153 F.3d 130 (4th Cir. 1998), *cert. denied*, 531 U.S. 895 (2000). The district court's failure to inform the defendant at his Rule 11 hearing that his sentence would include a term of supervised release and to describe to him the nature of supervised release before accepting his guilty plea was error. The court of appeals held that the court's oversight was not harmless error as outlined in *United States v. Good*, 25 F.3d 218 (4th Cir. 1994). The maximum term Thorne understood he could receive (235 months) was less than his actual sentence of 248 months (188 months in prison plus 60 months of supervised release). In the event he violated release, he would be subject to a further five years of incarceration, resulting in an even greater disparity. The court of appeals ordered that Thorne be permitted to withdraw his plea and plead anew.

United States v. Osborne, 345 F.3d 281 (4th Cir. 2003). The district court was not required, absent a defendant's request, to review *de novo* the Rule 11 proceedings conducted by a magistrate judge where the defendant clearly consented to entering a plea before a magistrate judge and raised no objection to the Rule 11 proceeding.

Rule 32

United States v. Cole, 27 F.3d 996 (4th Cir. 1994). The district court committed plain error in denying the defendant his right of allocution, in violation of Fed. R. Crim. P. 32(a)(1)(C).

United States v. McManus, 23 F.3d 878 (4th Cir. 1994), *cert. denied*, 535 U.S. 1008 (2002). The district court did not violate the provisions of Rule 32(a)(1)(A), which requires the sentencing court to determine that the defendant had the opportunity to read and discuss the PSR with his counsel before sentencing, by failing to pose certain questions to the defendant regarding his PSR. The defendant's markings such as "I surrender" on the PSR, his objections to the findings in the PSR, and his statements at sentencing about the trial evidence all indicated that the requirements of Rule 32 had been met.

United States v. Myers, 280 F.3d 407 (4th Cir.), *cert. denied*, 537 U.S. 852 (2002). The district court did not err by allowing victim allocution testimony because the defendant was convicted of a crime that involved the "use or attempted or threatened use of physical force." The appellate court held that because the language of the rule is "involved" and the rule is silent regarding the elements of the crime, physical force does not have to be an element of the offense of conviction. The defendant was convicted by a jury of possessing and using a firearm in furtherance of drug trafficking. The defendant argued that this was not a crime of violence under USSG §§4B1.1, 4B1.2 and therefore should not be considered as involving physical force. However, the appellate court agreed that the determination as to whether this was a crime of violence was appropriately made under Federal Rule of Criminal Procedure 32(c)(3)(E). Therefore, since the appellate court found that this crime is a crime of violence under Rule 32, the allowance of victim allocution testimony was proper.

United States v. Spring, 305 F.3d 276 (4th Cir. 2002). On plain error review, the court of appeals determined that the district court had erred in upwardly departing from Criminal History Category IV to V without affording the defendant notice of its intent to do so, in violation of Federal Rule of Criminal Procedure 32(c)(1). The sentence was vacated and remanded to allow the district court to consider an upward departure after hearing argument from the parties.

See United States v. Walker, 29 F.3d 908 (4th. Cir. 1994); §1B1.3, p. 4.

Rule 35

United States v. Martin, 25 F.3d 211 (4th Cir. 1994). The circuit court held that the government was required to make a USSG §5K1.1 substantial assistance motion at the time of sentencing for substantial assistance rendered prior to sentencing. A delay in making a substantial assistance motion, on the grounds that a Fed. R. Crim. P. 35(b) motion will be made at a later date, denies a defendant due process. However, the circuit court held that the defendant's plea agreement was effectively modified by the government's accession to make a substantial assistance motion based upon the defendant's presentence assistance, and the defendant was entitled to specific performance of this promise on remand.

United States v. Shank, 2005 U.S. App. LEXIS 1236 (4th Cir. 2005). The district court determined the loss was $305,000, and sentenced the defendant to 41 months, entering judgment on June 27, 2002. On July 3, 2002, the defendant filed a Rule 35 (c) (now Rule 35(a)) motion to correct the sentence because the amount of loss "was calculated incorrectly." The district court denied the motion on November 1, 2002, at which time defendant filed this appeal. The appellate

court held that a court may only correct a sentence under Rule 35(c) within seven days of the imposition of the sentence; timely filing by a defendant does not extend the period. By the plain language of Rule 35(c) (and Rule 35(a)), the court has jurisdiction to correct a sentence for only seven days after the imposition of the sentence. Because the defendant did not appeal until after the district court ruled on the 35(c) motion, more than ten days after the judgment, he lost his right of appeal under Rule 4(b) which suspends the ten-day period for defendants filing one of several enumerated timely motions that do not include Rule 35(c).

OTHER STATUTORY CONSIDERATIONS

United States v. Bowe, 309 F.3d 234 (4th Cir. 2002). Pending the defendant's appeal of an upward departure based on his own breach of the plea agreement, the defendant served time on probation. The court of appeals held that credit for time served on probation was improper and inconsistent with 18 U.S.C. § 3585(b), which allows computation for credit only for time spent in *official detention*.

United States v. Cobb, 144 F.3d 319 (4th Cir. 1998). The district court did not err in refusing to dismiss the carjacking count against the defendant. The court of appeals rejected the defendant's argument that the federal carjacking statute, 18 U.S.C. § 2119, exceeds Congress' authority under the Commerce Clause and is therefore unconstitutional. The Fourth Circuit joined other circuits which have considered the issue in holding that the carjacking statute lies within the bounds of Congress' commerce power.

See United States v. Dawkins, 202 F.3d 711 (4th Cir.), *cert. denied*, 529 U.S. 1121 (2000), §5E1.1, p. 40.

POST-*APPRENDI* (*Apprendi v. New Jersey*, 530 U.S. 466 (2000))

United States v. Angle, 254 F.3d 514 (4th Cir.), *cert. denied*, 534 U.S. 937 (2001). Defendants Angle and Phifer, who were convicted of conspiracy to possess with the intent to distribute and conspiracy to distribute cocaine and cocaine base,[22] were not able to establish *Apprendi* errors that affected their substantial rights. The district court did not err with respect to the Angle's sentence because the sentence imposed was 210 months and did not exceed the statutory maximum of 240 months. Nevertheless, the court vacated Angle's sentence and remanded for a finding of drug type and quantity because no official finding was made either by the jury or the sentencing judge.[23] Phifer's sentence of 292 months, on the other hand, did exceed the statutory maximum and was therefore *Apprendi* error. This error, however, did not affect his substantial rights because an application of USSG §5G1.2(d) would have yielded the same result. Section 5G1.2(d) requires that, in a multiple offense case where the applicable sentencing range exceeds the highest statutory maximum, "the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment." The result is that the total punishment

[22]Phifer was also convicted on two counts of money laundering.

[23]*Cf. United States v. Osteen*, 254 F.3d 521 (4th Cir. 2001) (the district court did not err in its finding of drug amount which was based on the approximation given by a credible witness and was supported by competent evidence).

required by the guideline range can still be satisfied without exceeding the statutory maximum for any one of the offenses, and thus, without running afoul of *Apprendi*.[24] The court distinguished language in *Apprendi* which cast doubt on its holding by reasoning that the *Apprendi* language was applicable to an argument against a finding of error, whereas in this case the court already made a finding of error and was considering whether the error affected the defendant's substantial rights.

United States v. Benenhaley, 281 F.3d 423 (4th Cir.), *cert. denied*, 537 U.S. 869 (2002). The district court erred in imposing a life sentence for a conviction of conspiracy to possess methamphetamine with intent to distribute it because the life sentence exceeded the statutory maximum otherwise applicable under section 841(b)(1)(C). In light of the decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), such a departure above the statutory maximum is in error if the departure is based on evidence not proved to the jury beyond a reasonable doubt.

United States v. Cannady, 283 F.3d 641 (4th Cir.), *cert. denied*, 537 U.S. 936 (2002). The district court did not err by not informing the defendant that drug quantity was an element of the drug offense underlying his conspiracy charge because drug quantity is not an element of section 841(b)(1)(C) violations. The district court did err in informing the defendant that he faced a maximum penalty of life imprisonment. Although the sentencing occurred before the decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *United States v. Promise*, 255 F.3d 150 (4th Cir. 2001), *cert. denied*, 535 U.S. 1098 (2002), in light of those decisions, his maximum penalty was actually 20 years. However, the defendant was not prejudiced by the error inasmuch as he made no argument that the information regarding the maximum sentence influenced his decision to plead guilty. Furthermore, the record showed not only that he wanted to plead guilty, but also that he did not want to go to trial under any circumstances. The error, though plain, was therefore not prejudicial and is insufficient to set aside his guilty plea.

United States v. Carrington, 301 F.3d 204 (4th Cir. 2002). The defendant was convicted of conspiring to traffic in an unspecified amount of crack cocaine. The Supreme Court vacated and remanded the decision in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Carrington v. United States*, 531 U.S. 1062 (2001). On remand, the court of appeals concluded that it was plain error to have sentenced the defendant on an indictment that did not specify drug quantity. However, the court declined to correct the error because the evidence of drug quantity necessary to justify the sentence imposed was overwhelming and essentially uncontroverted. Reducing the sentence based on a "technical error never objected to at trial would threaten the fairness, integrity, and public reputation of the judicial proceedings." *Id*. at 206.

United States v. Chong, 285 F.3d 343 (4th Cir. 2002). The district court did not err in convicting the defendant under 21 U.S.C. § 841 even in light of the rule of *Apprendi* that any factor other than a prior conviction that increases a defendant's sentence beyond the statutory maximum must be proved to a jury beyond a reasonable doubt. The defendant argued that 21 U.S.C. § 841 is facially unconstitutional. The appellate court followed its own holding from *United States v. McAllister*, 272 F.3d 228 (4th Cir. 2001), that 21 U.S.C. § 841 is not facially unconstitutional. *See also United States v. Dinnall*, 269 F.3d 418 (4th Cir. 2001), *cert. denied*, 532 U.S. 934 (2003) (the district court erred in sentencing the defendant to 30 years because his

[24]*See also United States v. White*, 238 F.3d 537, 543 (4th Cir.), *cert. denied*, 532 U.S. 1074 (2001); *United States v. Stewart*, 256 F.3d 231, 256 (4th Cir.), *cert. denied*, 534 U.S. 1049 (2001).

sentence exceeded the maximum of 20 years under 21 U.S.C. § 841 (b)(1)(C) for which he was indicted and to which he pled guilty).

United States v. General, 278 F.3d 389 (4th Cir.), *cert. denied*, 535 U.S. 949 (2002). The district court did not err in failing to inform the defendant that the government would be required to prove drug quantity beyond a reasonable doubt. Since the defendant received a sentence that falls within the statutory range of his charged offense, there is no violation of a *Apprendi* and therefore no error. Furthermore, failure to include drug quantity in the defendant's indictment does not invalidate his guilty plea because drug quantity is not an element of the charge for which he was sentenced.

The district court did not err in imposing a five-year term of supervised release in connection with his conviction for conspiracy to distribute and possession with intent to distribute. The defendant claims that the statute allows for a maximum term of three years of supervised release and that his sentence therefor is in violation of *Apprendi*. The appellate court held that the defendant misread the statute and that three years is actually the minimum supervised release term and therefore, *Apprendi* is inapplicable.

United States v. Harrison, 272 F.3d 220 (4th Cir. 2001), *cert. denied*, 537 U.S. 839 (2002). The court discounted the *Apprendi* claim the defendants posed; the fact that it was not determined beyond a reasonable doubt whether the firearm employed was a semi-automatic weapon was not relevant because the classification of a firearm as a semi-automatic weapon under 18 U.S.C. § 924(c)(1)(B)(i) was a sentencing factor, not an element of the offense.

United States v. Kinter, 235 F.3d 192 (4th Cir. 2000), *cert. denied*, 532 U.S. 937 (2001). The appellate court held that where sentencing enhancements under the sentencing guidelines did not extend the defendant's sentence beyond the maximums under the applicable criminal statute, the government was not required to submit to a jury and prove beyond a reasonable doubt the facts relevant to those enhancements. At sentencing, under the preponderance of the evidence standard, the court determined that the defendant paid more than one bribe and that Washington Data's profit was $9.5 million. Such findings required the court to impose a sentence between 46 and 57 months. The defendant was sentenced to 46 months. In the absence of these findings, the maximum punishment allowable under the sentencing guidelines for the defendant would have been ten months. The defendant appealed, contending that *Apprendi* requires these two facts to be submitted to a jury and proven beyond a reasonable doubt before forming the basis of an enhancement to his sentence. The appellate court noted that to find the "prescribed statutory maximum" as contemplated by *Apprendi*, one need only look to the language of the statute criminalizing the offense, and no further. The governing statutes in the defendant's case, 18 U.S.C. §§ 201(b)(1) and 371, permit sentences of up to 15 and 5 years respectively, which are well in excess of the 46-month concurrent sentences that the defendant received. The court affirmed the defendant's sentence and found no *Apprendi* violation.

United States v. Lewis, 235 F.3d 215 (4th Cir. 2000), *cert. denied*, 534 U.S. 814 (2001). The appellate court concluded that because no fact found by the district court in determining the defendant's sentence resulted in a penalty greater than the applicable statutory maximum, the defendant's due process rights were not violated.

United States v. Martinez, 277 F.3d 517 (4th Cir.), *cert. denied*, 537 U.S. 899 (2002). The appellate court held that 21 U.S.C. § 841 is not facially unconstitutional in light of *Apprendi*

v. New Jersey, 530 U.S. 466 (2000). The defendant argues that 21 U.S.C. § 841 is unconstitutional because it removes certain facts from the province of the jury and from a beyond a reasonable doubt standard. However, the appellate court asserts its own precedent that *Apprendi* does not render 21 U.S.C. § 841 unconstitutional, and thus the defendant's challenge has no merit.

United States v. Myers, 280 F.3d 407 (4th Cir.), *cert. denied*, 537 U.S. 852 (2002). The district court did not err when it imposed a life sentence without parole for the defendant's conviction for possession of a firearm by a felon because a life sentence does not exceed the statutory maximum imposed by 18 U.S.C. § 924(e)(1) and therefore is not in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The appellate court refused to extend *Apprendi* to include cases where the statutory maximum was not exceeded.

POST-*BLAKELY* (*BLAKELY V. WASHINGTON*, 124 S. CT. 2531 (2004))

United States v. Gripper, 2055 U.S. App. LEXIS 1441 (4th Cir. 2005). The appellate court upheld the district court's sentence enhancement from five to seven years as a result of the defendant's violation of 18 U.S.C. § 924 (c). The defendant raised a *Blakely* challenge to the sentence, but the appellate court noted that the indictment specifically charged the defendant with 18 U.S.C. § 924(c)(1)(A)(ii), an offense that carries a seven-year minimum penalty. The court noted that the jury found the defendant guilty of the charge, thus the sentence did not run violate the Sixth Amendment right articulated in *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004), *remanded* 2005 US LEXIS 1012 (2005). This *en banc* decision of the Fourth Circuit was the first Fourth Circuit opinion to explicitly address the Supreme Court's decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004). The PSR recommended a 12-level enhancement for committing a terrorist act after conviction for providing material support to a Foreign Terrorist Organization. The defendant countered that the jury did not find the requisite mental intent, thus the application of the enhancement violated both *Apprendi* and *Blakely*. The appellate court, following the lead of the Fifth and Sixth Circuits, determined that *Blakely* does not apply to the federal guidelines. The court noted that *Blakely* "did not change–indeed, it reaffirmed–the question we must ask in determining whether application of the federal sentencing guidelines is subject to the rule of Apprendi: When a defendant is to be sentenced pursuant to the guidelines, what is the prescribed statutory maximum"? The court decided that *Blakely*, like *Apprendi* before it, did not affect the guidelines because the "prescribed statutory maximum" is the maximum penalty provided in the statute setting forth the offense of conviction, not the top of the guideline range. At 71. Thus, *Blakely* did not affect the application of the guidelines. This decision forms the basis of the 4th Circuit's jurisprudence on *Blakely* related issues. *See, e.g.*, *United States v. Ruiz-Gutierrez*, 2005 U.S. App. LEXIS 214 (4th Cir. 2005); *United States v. Brooks* 111 Fed Appx. 701, 2004 U.S. App. LEXIS 22490 (4th Cir. 2004); *United States v. Hawkins*, 110 Fed. Appx. 302 (4th Cir. 2004); *United States v. Lowry*, 2004 U.S. App. LEXIS 24308 (4th Cir. 2004); *United States v. Ricketts*, 2004 U.S. App. LEXIS 25433 (4th Cir. 2004).

United States v. James, 2004 U.S. App. LEXIS 25741 (4th Cir. 2004). The defendant pled guilty to possession of 5 grams or more of crack cocaine with intent to distribute. He appealed the district court's finding that he had 213.45 grams of crack. The appellate court found that while the district court's reasoning was difficult to glean from the record, that the

record provided ample evidence for at least 150 grams of crack, not the 46.35 grams James claimed. It noted that the district court failed to comply with 18 U.S.C. § 3553(c)'s requirement for stating in open court the reasons for imposition of a particular sentence, but determined it could only review that failure under the plain error standard since the defendant failed to object during the sentencing hearing. The appellate court also rejected the defendant's claim of a Sixth Amendment right to confrontation of the government's witness during the sentencing hearing, noting that the right to confrontation does not attach to sentencing proceedings. The appellate court also rejected the defendant's claims of sixth amendment right to jury sentencing as per *Blakely*, noting that the Fourth Circuit had determined that *Blakely* did not apply to the federal guidelines.

United States v. Lockett,325 F. Supp. 2d 673 (E.D. Va. 2004). **Memorandum Opinion**. The district court found that the Supreme Court decision, *Blakely v. Washington*, 124 S. Ct. 2531 (2004), did apply to the federal guidelines. The court determined that it would thus use the guidelines as advisory rather than mandatory, using its "own, independent discretion" to fashion a sentence. *Id*. at 678. It noted that "in cases where sentencing enhancements are at issue which have neither been pled nor admitted by the defendant or otherwise proved beyond a reasonable doubt," the court will assume the guidelines are unconstitutional and will use an indeterminate sentencing scheme. *Id*. at 678.

United States v. Shamblin, 323 F. Supp. 2d 757 (S.D. W.Va. 2004). In a case remanded once for resentencing under *Apprendi*, the district court considers the impact of the days-old Supreme Court decision *Blakely v. Washington*, 124 S. Ct. 2531 (2004). Although inclusion of the relevant conduct and offense conduct resulted in an offense level of 48 (effectively 43 for sentencing purposes), the decision in *Apprendi* meant that the defendant could not be sentenced for longer than the statutory maximum prescribed by the statute defining the offense of conviction, in this case, the conspiracy to manufacture methamphetamine in violation of 21 U.S.C. § 846, which carries a maximum penalty of 240 months. The defendant moved for reconsideration under the recent decision of *Blakely*. The district court found *Blakely* to be controlling and to require that the guideline range based on the conduct found by the jury or admitted by the defendant to be the maximum sentence possible under *Blakely.* The district court found that the defendant only admitted to conspiracy to manufacture, but did not admit to any quantity of, metamphetamine, and thus the applicable sentencing range was 6 to 12 months. The district court resentenced to 12 months in compliance with its reading of *Blakely*. To date, there has been no appeal of this sentence.

POST-*BOOKER* (*UNITED STATES V. BOOKER*, 125 S. CT. 738 (2005))

United States v. Hammoud, 2005 US LEXIS 1012 (2005). The Supreme Court vacated the judgment of the Fourth Circuit and remanded for resentencing pursuant to *United States v. Booker*, 543 U.S. ___, 125 . Ct. 738 (2005).

United States v. Harrower, 2005 U.S. App. LEXIS 1506 (4th Cir. 2005). The Court vacated the sentence and remanded for resentencing in light of *Booker*. The defendant challenged the district court's application of a two-level enhancement relying on its finding that there were more than two victims. The appellate court noted that the defendant preserved the issue for appeal by raising it in district court.

United States v. Hughes, 2005 U.S. App. LEXIS 1189 (4th Cir. 2005). In light of *United States v. Booker, 125 S. Ct. 738* (2005), the appellate court finds reversible error in the district court's determination of a sentence for conviction of five counts of bankruptcy fraud and perjury based on facts not proven to the jury, and remands for resentencing consistent with the Supreme Court's opinion, particularly Justice Breyer's remedial portion of the opinion. At *1. The appellate court notes that the *Booker* decision has "abrogated [circuit] previously settled law". at *14. Courts are still required to "consult [the] Guidelines and take them into account when sentencing" quoting *Booker* (at *10). The Fourth Circuit announces its new standard of review, noting "[i]f the court imposes a sentence outside the guideline range, it should explain its reasons for doing so. In light of the excision of section 3743(e) by the Supreme Court, we will affirm the sentence imposed as long as it is within the statutorily prescribed range, *see Apprendi* 530 U.S. at 490, and is reasonable, *see Booker*." (At 11). That said, the appellate court reviews the sentencing determinations found by the district court and finds no error in the district court's determination of loss based on the value of the assets defendant sold at auction without disclosure to the bankruptcy court, in the two-level enhancement for "more than minimal planning" *see* USSG 2F1.1.(b)(2)(A), nor in the two-level enhancement for obstruction of justice as a result of his perjury conviction. Despite no finding of error in the initial calculation of the guideline range, the appellate court determines that *Booker* wrought such a major change in how federal sentencing is conducted that "the fairness, integrity, or public reputation of judicial proceedings" require resentencing consistent with *Booker*.

United States v. Tucker, 2005 U.S. App. LEXIS 1301 (4th Cir. 2005). The appellate court determined that since the sentence imposed after revocation of supervised release did not exceed the statutory maximum sentence, the standard of review is "plainly unreasonable."